Supreme Court
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GARY D. LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON,

Petitioners,

v.

MUHAMMAD SHABAZZ FARRAKHAN, AL KAREEM SHADEED, RAMON BARRIENTES, CLIFTON BRICENO, MARCUS PRICE, AND TIMOTHY SCHAAF.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Voting Rights Act, 42 U.S.C. § 1973, which prohibits voter disqualification based on race or color, allows an individual to challenge a state law that disenfranchises individuals based upon a felony conviction.

PARTIES

The parties to the proceeding below were:

Petitioners: Gary Locke, Governor of the State of Washington; Sam Reed, Secretary of State of the State of Washington; and the State of Washington. Petitioners were aligned as defendants/appellees below.

Respondents: Muhammad Shabazz Farrakhan, Al Kareem Shadeed, Ramon Barrientes, Clifton Briceno, Marcus Price, and Timothy Schaaf. Respondents were aligned as plaintiffs/appellants below.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Governor Gary Locke, Secretary of State Sam Reed, and the State of Washington, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 338 F.3d. 1009. App. 1a. The court's order denying the petition for rehearing and rehearing en banc and a dissent from the denial of rehearing en banc are published at 359 F.3d 1116. App. 29a. The order of the United States District Court for the Eastern District of Washington granting petitioners' motion for summary judgment and denying respondents' motion for summary judgment is unpublished. App. 54a. The district court's order granting in part and denying in part petitioners' motion to dismiss is published at 987 F. Supp. 1304. App. 67a.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2003. App. 1a. On February 24, 2004, the court issued an order denying a timely petition for rehearing and rehearing *en banc*. App. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." App. 91a. Section 2 of the Fourteen Amendment provides in part:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote . . . is denied to any of the male inhabitants of such state . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." App. 91a (emphasis added).

The Washington Constitution article VI, § 3 provides in part that "[a]ll persons convicted of infamous crime unless restored their civil rights . . . are denied the elective franchise." App. 93a. Wash. Rev. Code § 29A.08.520 (formerly Wash. Rev. Code § 29.10.097)[1] provides in part: "Upon receiving official

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[1] Effective July 1, 2004, Washington's election statutes are recodified into a new Title 29A. 2003 Wash. Laws III, § 2405. Because all citations to these statutes in decisions below and in the record are to the former codification, the former citation is provided parenthetically following each citation.

notice of a person's conviction of a felony . . . if the convicted person is a registered voter in the county, the county auditor shall cancel the defendant's voter registration." App. 99a. Other relevant Washington statutes are set out in the appendix. App. 93a-100a.

The Voting Rights Act (VRA), 42 U.S.C. § 1973(a), provides: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen to vote on account of race or color . . . ." App. 92a. 42 U.S.C. § 1973(b) provides in part that a "violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." App. 92a. Other relevant provisions of the VRA are set out in the appendix. App. 92a.

STATEMENT

Washington is one of 48 states that imposes some form of voter disqualification on felons.[2] Section 2 of the Fourteenth Amendment expressly permits states to disenfranchise felons, unless the disqualification is the result of purposeful racial

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[2] For a list of the relevant state law provisions see note 5 *infra* p. 21.

discrimination. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). In contrast to the Fourteenth Amendment, a violation of the Voting Rights Act may be established by the totality of the circumstances. It is not necessary to prove that the election law was designed or maintained for a discriminatory purpose. *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986). The question presented in this case is whether Congress intended the Voting Rights Act to apply to felon disenfranchisement.

A. Felon Disenfranchisement In Washington

1. Washington has disenfranchised felons since it was a territory. Wash. Terr. Law of 1866 (Rem. & Bal. Code, § 4755) ("No . . . persons convicted of an infamous crime, shall be entitled to the privilege of an elector."). When Washington became a state in 1889, felon disenfranchisement was written into the state constitution. Article VI, § 3 provided that: "All . . . persons convicted of infamous crime unless restored to their civil rights, are excluded from the elective franchise."[3] The two provisions were essentially the same - except that the constitution provided for the restoration of civil rights.

Under Washington law, an infamous crime is defined as "a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility." Wash. Rev. Code § 29A.04.079 (formerly

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[3] In 1988 the language of article IV, section 3 was amended to read: "All persons convicted of infamous crime, unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise." Wash. Const. amend. 83. App. 93a.

Wash. Rev. Code § 29.01.080). App. 99a. Criminal sentences longer than a year must be served in a state correctional facility. Wash. Rev. Code § 9.94A.190(1). App. 94a. This essentially equates an "infamous crime" with any felony. Wash. Rev. Code § 9A.04.040(2). Upon conviction in state court, the clerk of the sentencing court must notify the county auditor of the conviction. Wash. Rev. Code § 10.64.021. App. 99a. If the conviction occurs in federal court, the United States Attorney is required by federal law to provide similar notice. 42 U.S.C. § 1973gg-6(g). Upon receipt of the notice of conviction in either state or federal court, "if the convicted person is a registered voter in the county, the county auditor shall cancel the defendant's voter registration." Wash. Rev. Code § 29A.08.520 (formerly Wash. Rev. Code § 29.10.097). App. 99a.

2. Washington statutes provide for the reinstatement of civil rights of felons under several provisions. A felon sentenced under state determinate sentencing laws receives a certificate of discharge after completing all sentence elements. Wash. Rev. Code § 9.94A.637. App. 95a-97a. The civil rights of a felon sentenced under the prior indeterminate sentencing laws are restored upon discharge by the indeterminate sentencing review board. Wash. Rev. Code § 9.96.050. App. 97a-98a. Civil rights can also be restored through gubernatorial pardon. Wash. Rev. Code § 9.96.010. App. 97a. The clemency and pardons board also has the authority to restore the voting rights of any felon convicted in federal court or in an out-of-state court, whether or not the convicting jurisdiction has restored civil rights. Wash. Rev. Code § 9.94A.875.

B. Procedural History

1. Respondents Muhammad Shabazz Farrakhan, Al Kareem Shadeed, Ramon Barrientes, Clifton Briceno, Marcus Price, and Timothy Schaaf, are African-American, Hispanic-American and Native-American felons, either released from or still serving prison sentences entered against them in the Washington superior courts. All of their convictions are final and none of them raised any issue of race as a basis to challenge their conviction at trial, in direct appeal, or in any collateral challenge to their judgment and sentence. All of them have been disenfranchised, and none of them has had his civil rights restored.

2. Respondents filed an action in the United States District Court for the Eastern District of Washington against the Governor and Secretary of State of the State of Washington (the State). They claimed that Washington's felon disenfranchisement violated the Voting Rights Act, 42 U.S.C. § 1973, because it both denied the right to vote and had the impact of diluting minority voting strength. Respondents also claimed violations of the First, Fourth, Fifth, Sixth, Ninth, Fourteenth, and Fifteenth Amendments of the United States Constitution.

The State moved to dismiss the complaint for failure to state a claim. With regard to the Voting Rights Act claim, the State argued that Congress did not intend the Act to apply to felon disenfranchisement and that such an application would violate the plain statement rule set out by this Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

Under that rule, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460. "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

The district court rejected this argument concluding that the plain statement rule does not apply to the Voting Rights Act. App. 74a. The district court reasoned that the "Supreme Court has consistently recognized that Congress has the power to enforce the Fourteenth and Fifteenth Amendments through the VRA, despite the burdens those measures placed on the states." App. 74a (internal punctuation omitted). Therefore, because "these amendments, on which the VRA is based, altered the federal-state balance of power as contemplated by the original constitution, the 'plain statement' rule is simply inapplicable in the context of the VRA." App. 74a. Having concluded that the Voting Rights Act applies to felon disenfranchisement, the district court held that respondents had alleged sufficient facts to state a claim for vote denial under the VRA but not for voter dilution. App. 84a; App. 86a. The district court dismissed respondents' constitutional claims.

With regard to the Fourteenth and Fifteenth Amendments, the court noted that *Richardson*, 418 U.S. 24, held that felon disenfranchisement was

permitted under Section 2 of the Fourteenth Amendment. Thus, discriminatory intent must be purposeful. The court held that respondents' complaint failed to state a claim because it only alleged circumstantial evidence to establish that discrimination was the motivating factor behind Washington's felon disenfranchisement law. App. 86a-87a. The court dismissed the remaining constitutional claims because it would be inconsistent to interpret Section 2 of the Fourteenth Amendment as permitting felon disenfranchisement while concluding that another constitutional provision prohibited it. App. 87a-88a.

After the district court ruled on the motion to dismiss, respondents filed an amended complaint that continued to assert a vote denial theory under the Voting Rights Act, but abandoned their vote dilution claim and their constitutional claims. Respondents also claimed that Washington's procedure for restoring civil rights violated the VRA. The parties filed cross-motions for summary judgment. The district court found respondents failed to present a triable issue of vote denial under the VRA and granted summary judgment for the State. Despite having concluded that the VRA applies to felon disenfranchisement laws, the district court held "that the totality of the circumstances does not establish the requisite causal link between Washington's felon disenfranchisement provision and reduced minority access to Washington's political process." App. 64a. The district court also concluded that respondents "failed to establish a claim for vote denial because the causal chain runs, if at all, to a factor outside of the challenged voting

mechanism. If the court concluded that such evidence was sufficient to establish causation, it would effectively broaden the VRA to provide a remedy for societal discrimination outside the context of voting." App. 59a-60a. The district court also held that respondents presented no evidence of "history of official discrimination in the state . . . that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." App. 60a. The district court dismissed respondents' challenge to Washington's procedures to restore civil rights because they failed to present any evidence of discrimination. The district court also held that respondents lacked standing to challenge these procedures because none of them had attempted to have their civil rights restored. App. 65a.

3. Respondents appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit began by affirming the district court's holding that the Voting Rights Act applies to felon disenfranchisement. App. 13a ("As a preliminary matter, we agree with the district court that [respondents'] claim of vote denial is cognizable under Section 2 of the VRA."). However, unlike the district court, the Ninth Circuit did not discuss the application of the plain statement rule to the Voting Rights Act.

The court of appeals reversed the district court's holding that respondents failed to establish a claim for vote denial because the causal chain runs, if at all, to a factor outside of the challenged voting mechanism. The Ninth Circuit held that this was the wrong test and that "racial bias in the criminal

justice system may very well interact with voter disqualification to create the kinds of barriers to political participation on account of race that are prohibited by the VRA rendering it simply another relevant social and historical condition to be considered where appropriate." App. 22a. While expressing no opinion on the merits of respondents' claim, the Ninth Circuit remanded the case to the district court to evaluate the totality of the circumstances, including evidence of racial bias in Washington's criminal justice system. App. 23a. The Ninth Circuit also affirmed the district court's dismissal of the challenge to Washington's procedures to restore civil rights.

4. The state filed a timely motion for rehearing and rehearing *en banc*. Both motions were denied. However, seven judges dissented from the decision to deny rehearing *en banc*. A strongly worded dissent written by Judge Alex Kozinski concluded that "the VRA was never intended to reach felon disenfranchisement laws." App. 38a. Judge Kozinski reviewed the legislative history of the VRA and concluded that it was "crystal clear that felon disenfranchisement wasn't one of the practices Congress was concerned about." App. 40a. The dissent also concluded that the panel decision was inconsistent with this Court's decisions in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2002).

In *Garrett* and *Kimel*, the Court held that Congress must make findings establishing a pattern of unconstitutional conduct by the states before

Congress can exercise its authority under Section 5 of the Fourteenth Amendment. According to the dissent, "Congress could legitimately remedy *Hunter*-type[4] violations but it would have to have evidence that states were using felon disenfranchisement in a purposeful, invidious manner." App. 44a. Judge Kozinski expressed concern that in light of this Court's decisions in *Garrett* and *Kimel* and broadly applying the VRA to felon disenfranchisement "seriously jeopardizes its constitutionality." App. 41a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for two important reasons. First, there is significant conflict among the circuits as to whether Congress intended the Voting Rights Act to apply to felon disenfranchisement laws. Second, the case involves an important national question. Forty eight states have some form of felon disenfranchisement—so this case has ramifications far beyond the State of Washington. In addition, applying the VRA to felon disenfranchisement has significant implications for the criminal justice system. The VRA is not a vehicle to review a state's criminal justice system. Allowing for such a review through the VRA could significantly affect the relationship between the states and the federal government.

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[4] *Hunter v. Underwood*, 471 U.S. 222 (1985).

A. There Is A Conflict In The Circuits About Whether the Voting Rights Act Applies To State Felon Disenfranchisement Laws

1. There is a direct conflict between the Ninth and Eleventh Circuits and the Second Circuit over the application of the Voting Rights Act to felon disenfranchisement. The Ninth and Eleventh Circuits held—over vigorous dissents—that the VRA applies to felon disenfranchisement. The Second Circuit holds that it does not. There is also a substantial tension between the Sixth Circuit and the Second Circuit on this issue because the Sixth Circuit assumes that the VRA applies. The Court should grant review to resolve this conflict.

2. In the decision below, the Ninth Circuit held—with virtually no analysis—that respondents' "claim of vote denial is cognizable under Section 2 of the VRA." App.13a. The seven judges dissenting from the denial of rehearing *en banc* in the Ninth Circuit strongly disagreed. App. 47a. ("It is unlikely that Congress could have reached felon disenfranchisement even if it wanted to, at least not without a substantial evidentiary record and a more tailored remedy. In interpreting the VRA to reach felon disenfranchisement in a state without a history of race discrimination like Washington, the panel has created a constitutional problem that Congress itself avoided.")

The Eleventh Circuit reached the same conclusion in *Johnson v. Governor of the State of Florida*, 353 F.3d 1287 (11th Cir. 2003) (petition for rehearing pending). In *Johnson*, the plaintiffs challenged Florida's felon disenfranchisement under

the Voting Rights Act. The majority held that the VRA applies to felon disenfranchisement. *Johnson*, 353 F.3d at 1306 n.7 ("although Congress might not be able to ban all state criminal disenfranchisement laws, it may certainly exercise the power granted to it under Section 5 of the Fourteenth Amendment to enforce statutorily the constitutional prohibition against racially discriminatory criminal disenfranchisement"). Judge Phyllis A. Kravitch dissented. In her view, Congress did not intend the VRA to apply to felon disenfranchisement. *Id.* at 1316 ("For the majority's analysis of the Voting Rights Act to be correct, we must look for a clear statement from Congress that it intended such a constitutionally-questionable result. Instead of a clear statement from Congress that the majority's interpretation was intended, the legislative history indicates just the opposite-that Congress did not intend the Voting Rights Act to apply to felon disenfranchisement provisions") (citation and footnote omitted). Further, like the dissenters in the Ninth Circuit, Judge Kravitch expressed concern that "the majority's interpretation creates a serious constitutional question by interpreting the Voting Rights Act to trump the text of the Fourteenth Amendment." *Id.* at 1315.

The Sixth Circuit has not expressly ruled that the VRA applies to felon disenfranchisement. However, in *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), the court of appeals assumed that the VRA applied. *Wesley* also involved a challenge to the state felon disenfranchisement law by a convicted felon. The district court began by discussing the Voting Rights Act. It concluded that "Section 2 is a

constitutional exercise of congressional authority under the enforcement clauses of the Fourteenth and Fifteenth Amendments." *Wesley v. Collins*, 605 F. Supp. 802, 808 (M.D. Tenn. 1985). The district court went on to dismiss the case because the plaintiff's complaint failed to establish a connection between discriminatory exclusion of blacks from the political process and felon disenfranchisement. *Id.* at 812. On appeal, the Sixth Circuit affirmed the district court's conclusion that the plaintiff failed to establish this causal connection. The court did not discuss the application of the VRA to felon disenfranchisement but its decision assumed that the Voting Rights Act applied.

3. In contrast to the Ninth, Eleventh and (by implication) Sixth Circuits, the Second Circuit concluded that the Voting Rights Act does not apply to felon disenfranchisement. In *Muntaqim v. Coombe*, No. 01-7260, 2004 WL 870474 (2nd Cir. April 23, 2004). The Second Circuit held that the VRA "would alter the constitutional balance between the States and the Federal Government if it were construed to extend to state felon disenfranchisement statutes". *Muntaqim*, 2004 WL 870474, at *23. Thus in "absence of a clear statement from Congress to support that construction of the statute, we hold that [the VRA] does not extend to [felon disenfranchisement]." *Id.*

With regard to altering the constitutional balance, the court found that "felon disenfranchisement statutes cannot be conflated with other facially neutral voting rules that might fall within the ambit of [the VRA]." This was so for

two reasons. "First, it is indisputable that under our federal system, the States possess primary authority for defining and enforcing the criminal law." *Id.* at *16 (citation and internal punctuation omitted). Second, "the states have the primary responsibility for regulating the times, places, and manner of conducting federal elections under U.S. Const. art. I, § 4, cl. 1, and even more obviously for regulating elections to state office." *Id.* (citation and internal punctuation omitted). Thus, "[i]f New York State uses disenfranchisement as a tool to punish people who violate its laws, the application of [the VRA] to [felon disenfranchisement] would upset the sensitive relation between federal and state criminal jurisdiction." *Id.* (internal punctuation omitted).

The court also relied on the fact that "a State's discretion to deny the vote to convicted felons is fixed by the text of § 2 of Fourteenth Amendment" and that "there is a longstanding practice in this country of disenfranchising felons as a form of punishment." *Id.* at *16, *17 (internal punctuation omitted). The Second Circuit concluded that there was no plain statement because the legislative history of the VRA establishes that "the only consideration of felon disenfranchisement statutes in the entire history of the Voting Rights Act is Congress' explicitly announced intention to exclude such statutes from the § 1973b(c) tabulation of prohibited tests and devices." *Id.* at *19 (citation and internal punctuation omitted).

4. The conflict between the circuits is actual and substantial. The Second Circuit recognized that its decision was in conflict with the Ninth Circuit in the

decision below and with the Eleventh Circuit's decision in *Johnson*. *Id.* at *8 ("In *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), a panel of the Ninth Circuit, like the Eleventh Circuit, held that a claim of vote denial based on Washington State's felon disenfranchisement scheme is cognizable under [the VRA]."); *Id.* at *7. (In *Johnson*, "a divided panel of the Eleventh Circuit, over a dissent by Judge Phyllis A. Kravitch, reinstated claims that the felon disenfranchisement provision of the Florida Constitution violates [the VRA].") Moreover, this issue is a particularly difficult one. The Ninth and Eleventh Circuit's decisions were accompanied by strong dissents. Additionally, in an earlier decision of the Second Circuit, *Baker v. Pataki*, 85 F.3d 919 (2nd Cir. 1996), the court, sitting *en banc*, split evenly on the question of whether the Voting Rights Act applies to felon disenfranchisement. Five judges concluded that it did, and five judges concluded that it did not.

5. This case presents a good vehicle to decide whether the Voting Rights Act applies to felon disenfranchisement. Since respondents abandoned their constitutional claims, the only issue before the Court is whether the VRA applies. Given the split in the circuits and the disagreement within the circuits, this Court should grant review. As the Second Circuit concluded in *Muntaqim* "this panel believe[s] that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court." *Muntaqim*, 2004 WL 870474, at *23.

B. The Ninth Circuit's Decision Is Inconsistent With This Court's Decisions Requiring A Clear Statement Of Congress' Intent To Alter The Usual Constitutional Powers Of The States

1. Congress did not intend to apply the Voting Rights Act to state felon disenfranchisement laws. The Ninth Circuit's contrary conclusion ignores the legislative history of the VRA and is inconsistent with this Court's decisions on the relations between the states and the federal government. When Congress seeks to alter the "usual constitutional balance between the States and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460.

2. The decision below ignores this principle. The Constitution permits states to disenfranchise persons convicted of "participation in rebellion, or other crimes." U.S. Const. amend. XIV, § 2. This Court recognized in *Richardson*, 418 U.S. at 55-56, following an extensive review of state felon disenfranchisement laws, that Section 2 of the Fourteenth Amendment expressly allows states to deny the elective franchise to felons, including those who have completed their sentence and parole. *Id.* Although Section 2 of the Fourteenth Amendment authorizes felon disenfranchisement, there is no plain statement in the Voting Rights Act that Congress intended to apply the Act to felon disenfranchisement.

3. The Voting Rights Act of 1965 was "designed primarily to enforce the Fifteenth Amendment to the

Constitution of the United States and . . . also designed to enforce the Fourteenth Amendment and article I, section 4." House Report No. 89-439 (1965) ("1965 House Report"), *reprinted in* U.S. Code Cong. & Admin. News 1965, p. 2437. This Act was designed to address various exclusionary practices (i.e., literacy tests) in certain regions of the nation (referred to as covered areas) that were designed to prevent African-Americans from voting. The 1965 Act referred to such tests or devices as:

> "[A]ny requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b[c].

Outside covered areas, the 1965 Act barred application of tests or devices that had "been used . . . for the purpose *or with the effect* of denying or abridging the right of any citizen of the United States to vote on account of race or color, ..." 42 U.S.C. § 1973a[b] (emphasis added). Despite Congress' broader use of language to include situations where the "effect" was present, it was not the intent of Congress for the 1965 Act to apply to felony disenfranchisement, as evidenced in the 1965 Senate Report:

> "The third type of test or device covered is any requirement of good moral character. *This*

> *definition would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability.* It applies where lack of good moral character is defined in terms of conviction of lesser crimes." Senate Report No. 89-162 (1965), *reprinted in* 1965 U.S. Code Cong. & Admin. News 1965, p. 2562 (emphasis added).

A similar exemption was described in the 1965 House Report. *See* 1965 House Report, *reprinted in* 1965 U.S. House Code. Cong. & Admin. News at 2457 (the Act "does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony or mental disability").

4. Congress amended Section 2 of the VRA in 1982 to legislatively overturn this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *Bolden* held that proof of discriminatory intent was required as a prima facie evidence under the VRA. *See* Senate Report No. 97-417, pp. 2, 18-19 ("1982 Senate Report"), *reprinted in* U.S. Code Cong. & Admin. News 1982, pp. 179, 195-96. The 1982 amendments also prohibited any voting qualification imposed "in a manner which results in a denial or abridgment of the right . . . to vote on account of race or color." 42 U.S.C. § 1973(a). These amendments also added that a violation "is established if, based on the totality of the circumstances, it is shown that the political processes leading to the nomination or election in the State . . . are not equally open to

participation by" racial minorities. 42 U.S.C. § 1973(b).

Congress did not change the scope of the coverage of the VRA in 1982. *Chisom* v. *Roemer*, 501 U.S. 380, 384 (1980). There is no record that in 1982, Congress suddenly changed the intent of the VRA laid down in 1965, to apply the VRA to felons. *See, e.g.*, 1982 Senate Report at 27, *reprinted in* 1982 U.S.C.C.A.N., p. 204; *Extension of the VRA, Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, United States Senate,* 97th Cong., 2d Sess. (January 27, 28, February 1, 2, 4, 11, 12, 25, and March 1, 1982) (1982 Senate Hearings) .

5. In fact, since passage and amendment of the VRA, Congress has only confirmed its approval of the disenfranchisement of felons in the 1993 National Voter Registration Act by specifically listing the conviction of a felony as one of a limited group of reasons justifying cancellation of a voter's registration. *See* 42 U.S.C. § 1973gg-6(a)(3). Even more recently, Congress enacted the Help America Vote Act of 2002, which requires that state voter registration databases coordinate with state agency records on felon status for the purpose of purging registration lists of felons. *See* 42 U.S.C. § 15483(a)(2)(A)(ii)(I).

C. This Case Presents An Important National Question

1. This case presents an important national question for two reasons. First, 48 states—every state but Vermont and Maine—have some form of

felon disenfranchisement.[5] Throughout our nation's

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[5] Ala. Const. § 182; Ala. Code § 17-3-10; Alaska Const. art. V, § 2; Alaska Admin. Code § 15.60.010(7); Ariz. Const. art. VII, § 2; Ariz. Rev. Stat. Ann. § 16-101(A)(5); Ark. Const. amend. 51, § 11(a)(4); Cal. Const. art. II, § 4; Colo. Const. art. VII, § 1; Colo. Rev. Stat. Ann. § 1-2-103; Conn. Gen. Stat. § 9-46; Del. Const. art. V, § 2; Del. Code Ann. tit. 15, § 6101; Del. Code Ann. tit. 15, § 6102; Del. Code Ann. tit. 15, § 6103; Del. Code Ann. tit. 15, § 6104; Del. Code Ann. tit. 15, § 6105; Del. Code Ann. tit. 15, § 6106; Del. Code Ann. tit. 15, § 6107; D.C. Const. art. V, § 1; Fla. Const. art. VI, § 4; Fla. Stat. Ann. ch. IX, pt. II, § 97.041; Ga. Const. art. II, § 1; Ga. Code Ann. tit. 21, § 21-2-216(b); Haw. Const. art. II, § 2; Haw. Rev. Stat. ch. 831, § 831-2; Idaho Const. art. VI, § 3; Idaho Code tit. 18, § 18-310; Ill. Const. art. III, § 2; Ill. Rev. Stat. ch. 10, art. 3; Ind. Const. art. 2; Ind. Code Ann. § 3-7-13-4; Iowa Const. art. II, § 5; Iowa Code tit. II, § 48A.6; Kan. Stat. Ann. ch. 21, § 21-4615; Ky. Const. § 145; Ky. Rev. Stat. Ann. § 116.113; La. Const. art. I, § 10; La. Rev. Stat. Ann. tit. 18, § 102; Md. Const. art. I, § 4; Md. Code Ann. tit. 3, § 3-102; Mass. Const. amend. art. 120; 2001 Mass. Acts ch. 150; Mich. Const. art. II, § 2; Mich. Comp. Laws Ann. § 168.758; Minn. Const. art. VII, § 1; Minn. Stat. Ann. § 201.014; Miss. Const. art. 12, § 241; Mo. Ann. Stat. ch. 115, § 115.133; Mont. Const. art. IV, § 2; Neb. Const. art. VI, § 2; Neb. Rev. Stat. § 32-313; Nev. Rev. Stat. Ann. art. 2, § 1; N.H. Rev. Stat. Ann. ch. 607, § 607-A:2; N.J. Const. art. II, § I; N.Y. Const. art. II, § 3; N.M. Stat. Ann. ch. 31, art. 13, § 31-13-1; N.C. Const. art. VI, § 2; N.C. Const. art. VI, § 8; N.C. Gen. Stat. § 13-1; N.C. Gen. Stat. ch. 163, § 163-55; N.D. Const. art. II, § 2; N.D. Cent. Code tit. 12.1, ch. 12.1-33, § 12.1-33-01; Ohio Rev. Code Ann. tit. XXIX, ch. 2961, § 2961.01; Okla. Stat. Ann. tit. 26, § 4-101; Or. Const. art. II, § 3; Or. Rev. Stat. § 137.281; Pa. Con. Stat. Ann. tit. 25, § 1301; Pa. Election Code § 102(w), art. I, § 2602; R.I. Const. art. II, § 1; S.C. Code Ann. § 7-5-120; S.D. Const. § 2; Tenn. Const. art. IV, § 2; Tenn. Code Ann. § 40-20-112; Tex. Const. art. VI, § 1; Tex. Elec. Code Ann. § 11.002(4); Utah Const. art. IV, § 6; Va. Const. art. II, § 1; Va. Code Ann. § 24.2-409; Va. Code Ann. § 24.2-418; Va. Code Ann. § 24.2-427; W. Va. Const. art. IV, § 1; Wis. Stat. Ann. § 6.03(1)(b); Wyo. Stat. tit. 22, ch. 1, § 22-1-102. The text of these constitutional and

history, felon disenfranchisement has been the norm; states allowing felons to vote has been the exception. *See Developments in the Law:One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939, 1942 (2002). As a result of the widespread use of felon disenfranchisement, the question presented in this case will be important throughout the nation. Moreover, there is currently continuing litigation in the lower courts over the application of the Voting Rights Act to felon disenfranchisement. *See Simmons v. Secretary of the Commonwealth*, U.S.D.C. No. 01-11040-MLW (D. Mass); *Hayden v. Pataki*, U.S.D.C. No. 00-8586 (S.D.N.Y.); *NAACP v. Harvey*, N.J. Super. Ct. Ch. Div., UNN-C-4-04. Whether the Voting Rights Act applies to felon disenfranchisement is the fundamental first question. The Court should grant review to resolve it.

2. The second reason the question in this case is important is that it involves the critical relationship between the federal courts and the state criminal justice system. This Court has recognized, "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995). Consequently, federal court review of state criminal proceedings has been limited. "Federal courts hold no supervisory authority over state judicial proceedings and may intervene [in habeas corpus actions under 28 U.S.C. § 2254] only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455

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statutory provisions are set out in the Appendix starting at 101a.

U.S. 209, 221 (1982). The *Rooker-Feldman* doctrine prohibits federal judges from engaging in an impermissible appellate review of a state court judgment where it considers arguments that are inextricably intertwined in the merits of that judgment. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923).

Application of the Voting Rights Act to felon disenfranchisement rests uncomfortably along side this limited federal court review of state criminal proceedings. In effect, plaintiffs seek to use the VRA to obtain federal court review in broad and undefined fashion of state criminal justice systems under the "totality of the circumstances" test. The unintended intrusion into the state criminal justice system via the Voting Rights Act raises a substantial issue involving the relationship between the states and the federal government. This Court should grant review to resolve this issue.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request their petition for certiorari be granted.

Respectfully submitted.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GARY D. LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON,

Petitioners,

v.

MUHAMMAD SHABAZZ FARRAKHAN, AL KAREEM SHADEED, RAMON BARRIENTES, CLIFTON BRICENO, MARCUS PRICE, AND TIMOTHY SCHAAF.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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F0R PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, individually aka Ernest S. Walker; MARCUS X. PRICE, individually; RAMON BARRIENTES, individually; TIMOTHY SCHAAF, individually; CLIFTON BRICENO, individually; AL-KAREEM SHADEED, individually, *Plaintiff-Appellants,* v. STATE OF WASHINGTON; GARY LOCKE, in his official capacity as Governor of the state of Washington; SAM REED, in his Official capacity of Secretary of State and Chief Election Officer For the State of Washington; JOSEPH LEHMAN, in his official Capacity as Secretary of the Department of Corrections of the State of Washington, *Defendants-Appellees.*	)))

Before: Harlington Wood Jr.,[1] Dorothy .W. Nelson and Richard A. Paez, Circuit Judges.

Opinion by PAEZ

COUNSEL

Lawrence A. Weiser, Spokane, Washington, argued the case for the plaintiffs-appellants. D.C. Cronin and Jason T. Vail, Spokane, Washington, assisted on the briefs.

Jeffrey Even, Assistant Attorney General, Olympia, WA, argued the case for the defendants-appellees. Christine O. Gregoire, Attorney General, and Daniel Judge, Assistant Attorney General, Olympia, WA, assisted on the briefs.

OPINION

PAEZ, Circuit Judge:

Plaintiffs appeal the district court's grant of summary judgment dismissing their claim that Washington state's felon disenfranchisement scheme constitutes improper race-based vote denial in violation of Section 2 of the Voting Rights Act ("Section 2"), 42 U.S.C. § 1973. Upon conviction of an infamous crime in the state of Washington, each plaintiff was disenfranchised, and none has had his voting rights restored.

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[1] The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

The district court determined that although Washington's felon disenfranchisement scheme disenfranchises a disproportionate number of African- American, Hispanic-American, and Native-American minorities, the cause of this disparate impact on their right to vote was external to the felon disenfranchisement provision *itself* and therefore could not provide the requisite causal link between the voting qualification and the prohibited discriminatory result.

Notably, the district court attributed the cause of this discriminatory effect on minority voting power to "discriminatory activity" in Washington's criminal justice system. Although it determined that "Plaintiffs' evidence of discrimination in the criminal justice system, and the resulting disproportionate impact on minority voting power, is compelling," the district court held that evidence of discrimination in the criminal justice system was not significant for purposes of the "totality of the circumstances" analysis used in determining whether a challenged voting practice results in a denial of minority voting rights under Section 2. Instead, focusing on the disenfranchisement scheme itself, the court concluded that there was no evidence that the enactment of Washington's disenfranchisement provision "was motivated by racial animus, or that its operation *by itself* has a discriminatory effect," and therefore determined that Plaintiffs had failed to establish a Section 2 violation.

We disagree with the district court's analysis, because it conflicts with our well-established understanding of Section 2. As recognized by both the Supreme Court and our circuit, a Section 2

"totality of the circumstances" inquiry requires courts to consider how a challenged voting practice *interacts with* external factors such as "social and historical conditions" to result in denial of the right to vote on account of race or color. *Thornburg v. Gingles,* 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *see also Smith v. Salt River Project Agric. Improvement & Power Dist.,* 109 F.3d 586, 595-96 (9th Cir.1997). Because a Section 2 analysis clearly requires that we consider factors external to the challenged voting mechanism itself, we hold that evidence of discrimination within the criminal justice system can be relevant to a Section 2 analysis. In light of the district court's having improperly disregarded this evidence, combined with its assessment that Plaintiffs' evidence of discrimination in Washington's criminal justice system was "compelling," we reverse and remand for further proceedings.

BACKGROUND

Felon disenfranchisement is a voting restriction that denies citizens who are convicted of felonies the right to vote. Article VI, Section 3 of the Washington State Constitution provides that "[a]ll persons convicted of an infamous crime ... are excluded from the elective franchise."[2] Disenfranchised felons in Washington remain ineligible to vote until they have completed all the requirements of their sentences and have obtained certificates of discharge under Section 9.94A.637 of the Revised Code of Washington

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[2] Under Washington law, an "infamous crime" is a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility. RCW § 29.01.080

("RCW"). A discharge under Section 9.94A.637 has "the effect of restoring all civil rights lost by operation of law upon conviction." RCW § 9.94A.637(4).

Plaintiffs Muhammad Shabazz Farrakhan, Marcus Price, Ramon Barrientes, Tim Schaaf, Clifton Briceno, and Al-Kareem Shadeed[3] are citizens who were convicted of felonies in Washington state and consequently disenfranchised under Article VI, Section 3 of the Washington State Constitution. None of the plaintiffs has had his civil rights restored under RCW § 9.94A.637.

When Plaintiffs initially filed their complaint, they challenged Washington's disenfranchisement scheme on federal constitutional grounds and as violative of the Voting Rights Act ("VRA").[4] They sought both declaratory and injunctive relief to enjoin Defendants[5] from applying the voting restriction and

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[3] Plaintiffs Farrakhan, Price, Shadeed, and Schaaf are African-American. Plaintiff Briceno is Native American. Plaintiff Barrientes is Hispanic-American. Section 2 protects "any citizen who is a member of a protected class of racial minorities." *Gingles*, 478 U.S. at 43, 106 S.Ct. 2752

[4] Plaintiffs challenged both Washington's disenfranchisement law, set out in Article VI, Section 3 of the Washington State Constitution, and its process for restoring voting rights to those felons who have completed all requirements of their sentence, as provided under former RCW Section 9.94A.220. In 2002, Section 9.94A.220 was amended and recodified as Section 9.94A.637. Unless otherwise noted, all further references are to the version of the statute challenged by Plaintiffs--RCW § 9.94A.220.

[5] The defendants are the State of Washington, Washington Governor Gary Locke, Washington Secretary of State Sam Reed, and Secretary of the Washington State Department of

related statutory provisions against all felons. In allowing Plaintiffs to proceed on their vote denial claim under Section 2, the district court rejected the State's argument that the VRA could not apply to felon disenfranchisement laws. *Farrakhan v. Locke*, 987 F.Supp. 1304, 1311 (E.D.Wa.1997). However, the court dismissed Plaintiffs' constitutional and vote dilution claims and denied Plaintiff Farrakhan's request for leave to file a due process challenge to Washington's statutory scheme governing the restoration of felons' civil rights. *Id.* at 1315.

In their Fourth Amended Complaint, Plaintiffs alleged that Article VI, Section 3 of the Washington Constitution, along with the process set forth for restoration of disenfranchised felons' civil rights, result in the denial of their right to vote on account of race in violation of Section 2. This was the operative complaint upon which the parties relied when they filed cross-motions for summary judgment.

In support of its motion, the State filed a statement of material facts as required by Rule 56.1(a) of the Local Rules for the Eastern District of Washington. In this statement, the State set forth facts that it contended were not disputed regarding (1) Plaintiffs' criminal histories and the fact that none had completed all the requirements of his sentence, (2) the background and history of Washington's felon disenfranchisement law and statistics regarding citizens who had been affected by it, (3) the statutory procedure for restoration of civil rights and

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Corrections Joseph Lehman (collectively the "State").

reinstatement of the right to vote, (4) the history of Washington's African-American population, (5) the racial and ethnic make-up of Washington's population, (6) the composition of Washington's felony population, (7) the background and work of the Washington State Minority and Justice Commission, ("WSMJC") and (8) the history of and changes to Washington's voting laws and practices. With the exception of three issues relating to the operation of Washington's disenfranchisement scheme and its history of discrimination against Native Americans, Plaintiffs did not dispute the State's statement of material facts.

To substantiate their vote denial claim, however, Plaintiffs presented statistical evidence of the disparities in arrest, bail and pre-trial release rates, charging decisions, and sentencing outcomes in certain aspects of Washington's criminal justice system.[6] They also submitted expert declarations and relied on the same reports and studies that the State had submitted to show the extent to which these disparities could be attributed to racial bias and discrimination.[7] In addition to this evidence regarding racial bias in Washington's criminal

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[6] One such statistic showed that although African-Americans constituted 3% of Washington's overall population, they accounted for 37% of the "persistent offender" sentences handed down by Washington courts.

[7] These reports included the WSMJC 1999 study entitled *The Impact of Race and Ethnicity on Charging and Sentencing Processes for Drug Offenders in Three Counties of Washington State* and the Final Report of Dr. George Bridges, Ph.D., also commissioned by the WSMJC, entitled *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-trial Detention Practices in Washington.*

justice system, Plaintiffs offered evidence of the tenuous policy justifications for Washington's felon disenfranchisement law, and presented evidence of the discriminatory intent that guided the enactment of these laws in several states, discussing the similarities between other states' statutes and the one enacted in Washington.

As noted, the district court ultimately granted the State's motion for summary judgment. Despite the fact that there was little dispute over the State's separate statement of material facts,[8] the district court nonetheless characterized Plaintiffs' evidence of discrimination in Washington's criminal justice system and the resulting disproportionate impact on minority voting power as "compelling."[9] However,

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[8] Although the Local Rules for the Eastern District of Washington require the party opposing a motion of summary judgment to submit a separate document setting forth any disputes it has with the moving party's statement of uncontroverted facts, the Local Rules leave to the court's discretion whether to assume that certain facts have been admitted without controversy. *See* E.D. Wash. R. 56.1(d) ("In determining any motion for summary judgment, the Court *may* assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by the record set forth in [the opposing party's responsive memorandum]." (emphasis added)). Here, the district court did not indicate whether it assumed that some or all of the state's undisputed facts were "admitted to exist without controversy." The district court's characterization of Plaintiffs' evidence as "compelling" suggests that, at least with respect to some of the State's material facts, it did not assume that they were "admitted to exist without controversy."

[9] Because the district court did not explicitly point to any particular aspect of Plaintiffs' evidence of discrimination in Washington's criminal justice system, its assessment of the

the district court ultimately concluded that such evidence was insignificant to its inquiry regarding a possible causal connection between the disenfranchisement provision and the disproportionate impact on the number of minorities ineligible to vote.[10] As we explain, the district court's analysis and conclusion misunderstand Section 2's "totality of the circumstances" test, which requires the court to consider the way in which the disenfranchisement law interacts with racial bias in Washington's criminal justice system to deny minorities an equal opportunity to participate in the state's political process.

DISCUSSION

I.

Congress enacted the VRA for the broad remedial purpose of "rid[ding] the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Initially responding "to the increasing sophistication with which the states were denying racial minorities the right to vote," *Farrakhan*, 987 F.Supp. at 1308, Congress amended Section 2 of the VRA in 1982 to relieve plaintiffs of

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strength of Plaintiffs' evidence must refer to both its statistical evidence and the expert studies that analyzed the racial bias evidenced by those statistics.

[10] The court further concluded that Plaintiffs lacked standing to challenge the process for restoration of civil rights under Section 9.94A.220, because no Plaintiff had yet qualified for such relief or had even attempted to regain his civil rights.

the burden of proving discriminatory intent.[11] *Chisom v. Roemer,* 501 U.S. 380, 394, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991); *Ruiz v. City of Santa Maria,* 160 F.3d 543, 557 (9th Cir.1998) (noting Congress's statement that the "intent test" was "unnecessarily divisive in that it involved charges of racism on the part of individual officials or entire communities [and] placed an inordinately difficult burden of proof on plaintiffs and [ ] asked the wrong question." (internal alteration and quotation marks omitted)). As amended, Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens

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[11] Congress amended the VRA with the express purpose of clarifying that discriminatory intent was not required to establish a Section 2 violation after a plurality of the Supreme Court held that the pre-1982 VRA, like the Fifteenth Amendment, required proof of discriminatory intent. *See City of Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

> protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. Thus, a plaintiff may establish a Section 2 violation by showing that, based on of the totality of the circumstances, the challenged voting practice results in discrimination on account of race.[12]

The Senate Report accompanying the 1982 amendments identified "typical factors" that may be relevant in analyzing whether Section 2 has been violated:

(1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

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[12] We have held that the totality of the circumstances approach applies to both vote dilution and vote denial claims. *Salt River*, 109 F.3d at 596 n. 8.

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;

(8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

(9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

See S.Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 ("Senate Report").

Congress did not intend this list to be comprehensive or exclusive, nor did it intend that "any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 29. Rather, as explained by the Supreme Court, in examining the totality of the circumstances to determine whether a challenged voting practice results in vote denial or vote dilution on account of race, courts must consider how the challenged practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles,* 478 U.S. at 47, 106 S.Ct. 2752.

II.

As a preliminary matter, we agree with the district court that Plaintiffs' claim of vote denial is cognizable under Section 2 of the VRA. Felon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA. 42 U.S.C. § 1973. Indeed, the Supreme Court has made clear that states cannot use felon disenfranchisement as a tool to discriminate on the basis of race, *see Hunter v. Underwood,* 471 U.S. 222, 233, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (holding that where racial bias motivated its original enactment, a facially neutral felon disenfranchisement law violated the Equal Protection Clause), and Congress specifically amended the VRA to ensure that, "in the context of all the circumstances in the jurisdiction in question," any disparate racial impact of facially neutral voting requirements did not result from racial discrimination, Senate Report at 27; *see also Chisom*

v. Roemer, 501 U.S. at 394 & n. 21, 111 S.Ct. 2354.

Permitting a citizen, even a convicted felon, to challenge felon disenfranchisement laws that result in either the denial of the right to vote or vote dilution on account of race animates the right that every citizen has of protection against racially discriminatory voting practices. Although states may deprive felons of the right to vote without violating the Fourteenth Amendment, *Richardson v. Ramirez*, 418 U.S. 24, 54-55, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress.[13]

III.

Next, we consider whether the district court erred in failing to consider evidence of racial bias in Washington's criminal justice system in determining whether Washington's felon disenfranchisement laws result in denial of the right to vote on account of race. We hold that it did, as the district court misconstrued the causation requirement of a Section 2 analysis.

A.

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[13] In so holding, we note that the Sixth Circuit proceeded to engage in a Section 2 analysis to evaluate a challenge to Tennessee's felon disenfranchisement statute, *see Wesley v. Collins*, 791 F.2d 1255 (6th Cir.1986) (ultimately holding that the Tennessee statute did not violate the VRA), and that the Second Circuit, sitting *en banc*, split five-to-five on the question of whether disenfranchised felons could state a claim under the VRA. *Baker v. Pataki*, 85 F.3d 919 (2d Cir.1996).

Relying extensively on our decision in *Salt River*, 109 F.3d at 594-96, the district court concluded that Plaintiffs had failed to demonstrate that Washington's felon disenfranchisement provision was either "motivated by racial animus, or that its operation *by itself* has a discriminatory effect."[14] Although it determined that the disenfranchisement statute resulted in the underrepresentation of minorities in Washington's political process, the district court found that Plaintiffs had failed to satisfy their causal burden because the cause of the underrepresentation "is not the voting qualification; instead, the cause is bias external to the voting qualification," i.e., discrimination in the criminal justice system.[15] In so ruling, the district court

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[14] The district court also relied on the Eleventh Circuit's decision in *Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir.1999), in "weighing the significance of Plaintiffs' evidence." In *Burton*, tenants of a predominantly black housing project claimed that the housing authority's refusal to petition and the City's failure to annex the project violated Section 2. *Id.* at 1186. In the view of the district court, the *Burton* decision "acknowledged that historical patterns of housing discrimination had segregated the African-American community ..., but held that this evidence was insufficient to establish a VRA violation because '[a]lthough Appellants have presented evidence of housing segregation in Belle Glade and in the two centers, we can find no evidence of any discrimination with respect to *voting*. *Id.* at 1198.' "

[15] Significantly, the district court concluded that "evidence of discrimination in the criminal justice system is only useful for establishing a generalized climate of discrimination which hinders minority opportunity to participate in the political process," but found that "such evidence, by itself" was not sufficient to establish a causal link between Washington's disenfranchisement provision and minority underrepresentation in Washington's political process.

applied a causal standard at odds with the *Salt River* decision (which "compelled" its understanding of the Section 2 analysis), the plain language of the VRA, its legislative history, and other well-established judicial precedent.

[1] Section 2 plainly provides that a voting practice or procedure violates the VRA when a plaintiff is able to show, based on the *totality of the circumstances,* that the challenged voting practice results in discrimination on account of race. 42 U.S.C. § 1973. The Supreme Court has interpreted "[t]he essence of a [Section] 2 claim" to be "that a certain electoral law, practice, or structure *interacts with social and historical conditions* to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles,* 478 U.S. at 47, 106 S.Ct. 2752 (emphasis added). Thus, it is clear that whether a particular practice results in vote denial or vote dilution in violation of Section 2 always depends on the "totality of the circumstances" in which the practice operates.

In fact, in *Salt River,* we applied the totality of the circumstances test to determine whether an agricultural improvement and power district's land ownership voting qualification violated Section 2. 109 F.3d at 594-95. The plaintiffs were African-American, non-landowning residents of the district who claimed that the land ownership requirement was a racially discriminatory voting qualification because a disproportionate percentage of landowners in the district were white. *Id.* at 588.

In assessing their claim, we considered both the interaction of the challenged landownership

requirement with the surrounding social and historical circumstances in the district and expert testimony "regarding the relationship, or lack thereof, between race and home ownership" in the district. *Id.* at 590. Deferring to the district court's factual findings, we focused on its conclusion that "the observed difference in rates of home ownership between non-Hispanic whites and African-Americans *is not substantially explained by race but is better explained by other factors independent of race*" which "adequately rebutted any inference of racial bias that the [disparate impact] statistics might suggest." *Id.* at 591 (emphasis added) (internal citations omitted). Because the land ownership rates did not reflect racial discrimination, we concluded that the land ownership requirement did not violate Section 2. *Id.* at 594-96.

In so concluding, the *Salt River* court did not focus solely on the land ownership requirement and exclude external factors that helped determine the qualification's disparate racial impact. Instead, we *considered* the external factors, but ultimately concluded that the statistics evidencing the disproportionate percentage of white landownership did not reflect racial discrimination and so failed to satisfy the "on account of race" requirement of the results test. As we noted, this conclusion was dictated by the *Salt River* plaintiffs' admission that there was no evidence of discrimination as measured by the Senate Report factors, *id.* at 595-96, and their stipulation to "the nonexistence of virtually every circumstance which might indicate that landowner-only voting results in racial discrimination," *id.* at 595, leaving only a bare statistical showing of disparate impact to support their Section 2 claim.

[2] In light of these constraints, the *Salt River* court's statement regarding the need for evidence of "a causal connection between the challenged voting practice and [a] prohibited discriminatory result," *id.* (internal quotation marks omitted) (alteration in original), simply does not stand for the proposition that the practice must, "by itself," cause the discriminatory result. Indeed, if it did, there would have been no need for the court to consider whether land ownership rates reflected racial discrimination or to assess other totality of the circumstances factors.

Further, demanding "by itself" causation would defeat the interactive and contextual totality of the circumstances analysis repeatedly applied by our sister circuits in Section 2 cases, as they also require a broad, functionally- focused review of the evidence to determine whether a challenged voting practice interacts with surrounding racial discrimination in a meaningful way or whether the practice's disparate impact "is better explained by other factors independent of race." *Salt River,* 109 F.3d at 591 (internal quotation marks omitted); *see, e.g., Ortiz v. City of Philadelphia Office of the City Comm'rs,* 28 F.3d 306, 310-16 (3d Cir.1994) (acknowledging that Section 2 violations occur when challenged voting practices interact with social and historical conditions to deny minorities equal access to the political process, but ultimately upholding Pennsylvania's voter purge law because there was no evidence that discrimination or societal disadvantages had contributed to low minority voter turnout); *Salas v. S.W. Tex. Junior Coll. Dist.,* 964 F.2d 1542, 1555-56 (5th Cir.1992) (noting that

"practical impediments to voting" are relevant in assessing a Section 2 challenge but finding no credible evidence that the effects of prior discrimination—including unemployment, illiteracy, and low income—had contributed to the low voter turnout that caused Hispanics' lack of electoral success, the court held that the real cause of this lack of success was not the challenged voting practice); *Irby v. Virginia State Bd. of Elections,* 889 F.2d 1352, 1358-59 (4th Cir.1989) (upholding an appointive rather than an elective scheme for selecting county school boards because (1) in the few counties in which blacks were significantly underrepresented the disparity was due to the fact that fewer blacks sought appointment, and (2) the composition of the officials responsible for making appointments either manifested no discrimination or should have been addressed through a challenge to the selection procedures for those officials); *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1574 (11th Cir.1984) (finding that the evidence demonstrated that blacks' lack of success at the polls was not due to "apathy" but rather due to social and historical factors including "a history of pervasive racial discrimination," and holding that an at-large election system therefore resulted in a Section 2 violation).

Moreover, the district court's "by itself" causation standard would effectively read an intent requirement back into the VRA, in direct contradiction of the clear command of the 1982 Amendments to Section 2. A facially neutral voting qualification, even one that results in substantial discriminatory effects, would only be discriminatory "by itself" if its purpose was to achieve those discriminatory effects. Instead, courts must be able

to consider whether voting practices "accommodate or amplify the effect that ... discrimination has on the voting process," *Salt River,* 109 F.3d at 595 n. 7 (internal quotation marks omitted); absent proof that the challenged practice was adopted or maintained out of overt, intentional racial animus, its disproportionate effect on minority voters could only ever be "on account of race" through its interaction with racial discrimination "outside of the challenged voting mechanism."

[4] In sum, although *Salt River* made clear that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the [Section] 2 'results' inquiry" because causation cannot be inferred from impact alone, 109 F.3d at 595, the legislative history of the VRA along with the consistent judicial interpretation of Section 2 clarify that "[e]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." Senate Report at 29 n.117. Certainly, plaintiffs must prove that the challenged voter qualification denies or abridges their right to vote on account of race, but the 1982 Amendments and subsequent case law make clear that factors outside the election system can contribute to a particular voting practice's disparate impact when those factors involve race discrimination. Therefore, under *Salt River* and consistent with both Congressional intent and well-established judicial precedent, a causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances. In light of this

determination, we turn to the question of whether evidence of racial discrimination in the criminal justice system qualifies as such evidence.

B.

As noted above, the Senate Report accompanying the 1982 Amendments identified "typical factors" that may be relevant in analyzing whether a particular voting practice violates Section 2, but Congress did not intend the listed factors to be exhaustive. The legislative history accompanying the 1982 Amendments acknowledged that "while these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative" of a Section 2 violation. Senate Report at 29. Further, the Supreme Court has emphasized the importance of maintaining a practical perspective when evaluating the effects or lawfulness of a challenged voting practice, *Gingles,* 478 U.S. at 46, 106 S.Ct. 2752, and courts have followed this directive in considering the lower socio-economic status of American Indians, *see Old Person v. Brown,* 312 F.3d 1036, 1042 (9th Cir.2002), the disproportionate number of blacks living in poverty and inadequate housing, *see Johnson v. Halifax County,* 594 F.Supp. 161, 169-70 (E.D.N.C.1984), a Board of Education's opposition to school desegregation, *see Marengo,* 731 F.2d at 1568, and the past and continuing unemployment, illiteracy, and low income that Hispanic citizens face, *see Salas,* 964 F.2d at 1556.

[4] Thus, simply because Congress did not specifically identify racial bias in the criminal justice system as a relevant factor in identifying a Section 2

violation does not mean that it should be excluded from a totality of the circumstances analysis. In fact, this kind of evidence is encompassed within the scope of factor (5), directing courts to consider "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health." Senate Report at 29.

[5] This factor underscores Congress's intent to provide courts with a means of identifying voting practices that have the effect of shifting racial inequality from the surrounding social circumstances into the political process. To the extent that racial bias and discrimination in the criminal justice system contribute to the conviction of minorities for "infamous crimes," such discrimination would clearly hinder the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic. Thus, racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section 2, rendering it simply another relevant social and historical condition to be considered where appropriate.

C.

[6] Indeed, had the district court properly interpreted the causation requirement under the totality of the circumstances test instead of applying its novel "by itself" causation standard, the court might have reached a different conclusion.[16]

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[16] Plaintiffs also presented evidence regarding the tenuous

Although we conduct a *de novo* review of the record, in light of the district court's assessment that Plaintiffs' evidence was compelling and its determination that such evidence was insignificant for its analysis of the totality of the circumstances surrounding Plaintiffs' Section 2 claim, we believe that it is appropriate to remand this claim to the district court for further proceedings. On remand, the district court should make any requisite factual findings following an appropriate evidentiary hearing, if necessary, and assess the totality of the circumstances, including Plaintiffs' evidence of racial bias in Washington's criminal justice system.

We recognize that this is a difficult issue and that it requires a searching inquiry into all factors that bear on Plaintiffs' claim. We, however, express no opinion on the merits of Plaintiffs' claim and leave that determination to the district court in the first instance.

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policy justifications for Washington's felon disenfranchisement law. In its order denying the State's motion to dismiss Plaintiffs' vote denial claim, the district court noted our criticism of the underlying policy justifications for Washington's law in *Dillenburg v. Kramer,* 469 F.2d 1222 (9th Cir.1972). Although recognizing that "*Dillenburg* is not good law to the extent that it suggests that the disenfranchisement of felons, on its face, cannot pass constitutional muster," the district court opined that "*Dillenburg* remains applicable ... to the extent that the decision discusses the alleged justifications for felon disenfranchisement statutes." 987 F.Supp. at 1312. The district court also noted that *Dillenburg* was especially critical of "Washington's law in particular, since it denies felons the right to vote based on the *possible* penalty for their offense, rather than their *actual* penalty or conduct." *Id.*

IV.

Plaintiffs also argue that Washington's statute for the restoration of civil rights, RCW § 9.94A.220, and the process that the State has adopted to implement the statute, violate Section 2.[17] The statute provides:

> (1) When an offender has completed the requirements of the sentence, the secretary of the department [of Corrections] or the secretary's designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge.
>
> (2) The discharge shall have the effect of restoring

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[17] As noted, Section 9.94A.220 was amended and recodified as Section 9.94.637. We further note that, along with several revisions to the existing subsections, Section 9.94A.637 contains a new subsection that provides

> (2) The court shall send a copy of every signed certificate of discharge to the auditor for the county in which the court resides and to the department. The department shall create and maintain a data base containing the names of all felons who have been issued certificates of discharge, the date of discharge, and the date of conviction and offense.

However, we analyze Plaintiffs' challenge to Washington's scheme for restoration of civil rights as the statute existed when the Fourth Amended Complaint was filed.

> (1) When an offender has completed the requirements of the sentence, the secretary of the department [of Corrections] or the secretary's designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge.
>
> (2) The discharge shall have the effect of restoring all civil rights lost by operation of law upon conviction, and the certificate of discharge shall so state.

all civil rights lost by operation of law upon conviction, and the certificate of discharge shall so state.

RCW § 9.94A.220. Plaintiffs contend that Washington's scheme for restoration of civil rights is "cumbersome, excessively complex, and places difficult burdens on offenders seeking restoration of voting rights."[18] Plaintiffs further argue that the statutory eligibility requirements violate the VRA by causing a disproportionately minority population to be prohibited from registering and voting.

With regard to the challenge to the eligibility statute itself, Plaintiffs have produced no evidence that minorities are less able to meet the

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[18] Plaintiffs state that felony offenders are typically unaware that their voting rights have been revoked upon conviction, and that upon release from incarceration, they are generally uninformed as to their voting status. Additionally, according to Plaintiffs, Washington's Secretary of State has no policy of either providing information to released felons about their status or ensuring that election officials are trained to answer questions regarding the voter eligibility of those convicted of an infamous crime under Washington law. The revised and recodified statute attempts to address some of the alleged deficiencies, as the legislative history accompanying the 2002 Amendments states:

The legislature recognizes that an individual's right to vote is a hallmark of a free and inclusive society and that it is in the best interests of society to provide reasonable opportunities and processes for an offender to regain the right to vote after completion of all the requirements of his or her sentence. The legislature intends to clarify the method by which the court may fulfill its already existing direction to provide discharged offenders with their certificates of discharge.

2002 Wash. Legis. Serv. 16 § 1 (West).

requirements for restoration.[19] At a minimum, Section 2 requires evidence that the challenged provision results in discrimination. The evidence submitted by Plaintiffs, however, demonstrates only that the disenfranchisement scheme may be discriminatory; Plaintiffs' evidence does not support a similar conclusion with respect to the restoration scheme, except insofar as it reflects any discrimination caused by the disenfranchisement scheme. Without evidence that minorities are less able to complete the eligibility requirements, Plaintiffs' challenge to these requirements must fail.[20]

As to Plaintiffs' challenge to the restoration procedures, the district court held that Plaintiffs lacked standing to challenge the restoration scheme because they presented no evidence of their eligibility, much less even allege that they were eligible for restoration, and had not attempted to have their civil rights restored. We conduct a *de novo* review of the standing question, *Hartman v. Summers,* 120 F.3d 157, 159 (9th Cir.1997), and we agree with the district court that Plaintiffs lack

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[19] Although the district court rejected Plaintiff Farrakhan's standing argument, we hold that he has standing to challenge the statutory eligibility requirements because Farrakhan has completed all terms of his judgment and sentence aside from his monetary restitution obligation.

[20] Plaintiffs also argue that the statutory requirement that they repay their monetary obligations in order to be eligible for restoration amounts to a *de facto* poll tax. Although this argument might be cognizable as an equal protection claim, *see Bynum v. Conn. Comm'n of Forfeited Rights,* 410 F.2d 173, 176-77 (2d Cir.1969), we do not consider it here because Plaintiffs have not asserted any equal protection claims.

standing to assert this claim.

Standing generally requires a plaintiff to establish the following: (1) injury in fact, (2) a causal connection between the injury and the conduct in question, and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Because Plaintiffs cannot meet the requirement of injury in fact, they lack standing to pursue this claim.

Plaintiffs argue that because Section 9.94A.220 prohibited them from registering and voting, they have suffered an injury in fact. However, proof of this element requires "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks and citations omitted). Plaintiffs' argument glosses over the fact that they have not been denied the right to vote because of the restoration process, but rather due to the disenfranchisement provision discussed at length above, and because they have not satisfied all the requirements of their sentences to become statutorily eligible for discharge of their convictions. The right to a discharge of conviction arises only upon the completion of all the requirements of the judgment and sentence.

To the extent that the basis for Plaintiffs' asserted injury in fact is the statutory process "as applied," their allegations of harm are conjectural or hypothetical—Plaintiffs speculate that the process would be "cumbersome, excessively complex, and

place[ ] a difficult burden on them" should they ever qualify for restoration of their civil rights under Section 9.94A.220.[21] Accordingly, we agree with the district court that Plaintiffs lack standing to challenge the process for obtaining restoration of their civil rights under RCW § 9.94A.220 as a violation of Section 2.[22]

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

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[21] Because we hold that Plaintiffs have not established an injury in fact, it is not necessary to address whether they satisfy the other standing requirements.

[22] As noted, the district court denied Plaintiff Farrakhan's request for leave to file a due process challenge to Washington's statutory scheme governing the restoration of felons' civil rights. *Farrakhan*, 987 F.Supp. at 1315. The district court concluded that Farrakhan lacked standing to pursue this claim. Because the above standing analysis is equally applicable to a putative due process claim, we find no error in the district court's ruling. Indeed, because they are not statutorily eligible for restoration, Plaintiffs no more have standing to challenge the restoration procedures on due process grounds than on Section 2 grounds.

F0R PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, individually aka Ernest S. Walker; MARCUS X. PRICE, individually; RAMON BARRIENTES, individually; TIMOTHY SCHAAF, individually; CLIFTON BRICENO, individually; AL-KAREEM SHADEED, individually, *Plaintiff-Appellants,* v.	)	No. 01-35032 D.C. NO. CV-96-00076-RHW Eastern District of Washington, Spokane ORDER
STATE OF WASHINGTON; GARY LOCKE, in his official capacity as Governor of the state of Washington; SAM REED, in his Official capacity of Secretary of State and Chief Election Officer For the State of Washington; JOSEPH LEHMAN, in his official Capacity as Secretary of the Department of Corrections of the State of Washington, *Defendants-Appellees.*	)	

Filed February 24, 2004

Before: Harlington Wood Jr.,[1] Dorothy .W. Nelson, and Richard A. Paez, Circuit Judges.

Order;
Dissent by Judge Kozinski

ORDER

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. FED. R. APP. P. 35.

The petition for rehearing en banc is denied.

KOZINSKI, Circuit Judge, with whom Judges O'SCANNLAIN, KLEINFELD, TALLMAN, BYBEE, CALLAHAN and BEA, join, dissenting from denial of rehearing en banc:

This is a dark day for the Voting Rights Act. In adopting a constitutionally questionable interpretation of the Act, the panel lays the groundwork for the dismantling of the most important piece of civil rights legislation since Reconstruction. The panel also misinterprets the evidence, flouts our voting rights precedent and tramples settled circuit law pertaining to summary

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[1] The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

judgment, all in an effort to give felons the right to vote. The court should have taken this case en banc and brought order back into our caselaw. I dissent from the court's failure to do so.

1. Plaintiffs' case is based entirely on statistical disparities: They claim that disparities in the felony conviction rates of certain minority groups in relation to their presence in the general population lead to a disparity in the rate of disenfranchisement under Washington's felon disenfranchisement law. They argue that these disparities alone prove that under the "totality of the circumstances" they have less of an opportunity to participate in the electoral process, because these disparities interact with the felon disenfranchisement provision and result in denial of the right to vote on account of race.

Though the panel hints otherwise, plaintiffs never produced a shred of evidence of intentional discrimination in Washington's criminal justice system. The studies and expert testimony plaintiffs rely upon establish only disparities. For example, the Washington State Minority and Justice Commission study of bail and pre-trial detention practices admits that "it would be inappropriate to conclude that racial and ethnic differences in pre-trial release necessarily reflect overt racial bias or discrimination in the decisions of Superior Court judges or staff." S.E.R. at 221. The same is true of charging and sentencing of felony drug offenders; the report plaintiffs rely upon attributes any disparities there to concerns about resources, not race: "charges are routinely changed between initial filing and conviction" but "these changes are, for the most part, not related to race." S.E.R. at 243.

Studies based on statistical disparities are notoriously unreliable. *See McCleskey v. Kemp,* 481 U.S. 279 (1987). Plaintiffs' own expert, Dr. Bridges, concedes that "[d]isparities have complex causes and among them are important qualitative differences among defendants in the types of crimes they have committed." S.E.R. at 221. The bottom line is plaintiffs have produced no evidence that Washington's criminal justice system is infected with racial bias.

This is significant because the record is settled. The panel admits that "[p]laintiffs did not dispute the State's statement of material facts." Slip op. at 10134. No triable issues of fact remain. The legal question presented is therefore quite simple: Can plaintiffs survive a summary judgment motion in a section 2 vote denial case if they have produced only evidence of statistical disparities in an area external to voting, which then result in statistical disparities in voting? Under *Smith v. Salt River Project Agricultural Improvement and Power District,* 109 F.3d 586 (9th Cir.1997), the answer is clearly "no." Yet the panel reverses the district court's grant of summary judgment. In so doing, it effectively holds that such disparities could be enough to establish vote denial on account of race, in violation of section 2 of the Voting Rights Act (VRA), 42 U.S.C. § 1973. This holding plainly contradicts the law of our circuit and four others. *See Salt River,* 109 F.3d at 595; *Ortiz v. City of Philadelphia Office of the City Comm'rs,* 28 F.3d 306, 314-15 (3d Cir.1994); *Salas v. Southwest Texas Junior Coll. Dist.,* 964 F.2d 1542, 1556 (5th Cir.1992); *Irby v. Virginia State Bd. of Elections,* 889 F.2d 1352, 1358-59 (4th Cir.1989);

Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir.1986).

In *Salt River,* we held that statistical disparities were *not* enough to establish vote denial under section 2. We explained that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry" because causation cannot be inferred from impact alone. *Id.* at 595. We upheld a land-owner voting system against a section 2 challenge because it did not result in discrimination "on account of race or color," *id.* at 596, even though whites were more likely to have a vote under that system because their rate of home ownership was much higher than that of blacks, *id.* at 590. Evidence of racial disparities in the rate of land ownership, which were then mapped directly onto the voter registration rolls, could not support a violation of the VRA. *Salt River* therefore stands for the principle that plaintiffs cannot prove a section 2 violation without substantial evidence other than a statistical disparity in some area unrelated to voting. There is nothing in the record here beyond statistical disparities, and the facts are settled. Summary judgment for Washington is therefore the only possible outcome.

The Sixth Circuit rejected a section 2 challenge of Tennessee's felon disenfranchisement law that was based primarily on statistical differences between minority and white convictions. *Wesley,* 791 F.2d at 1262. The court upheld Tennessee's statute under the "totality of the circumstances" test, even as it recognized "the presence in Tennessee of certain factors enumerated in the legislative history of Section 2, such as a history of racial discrimination, the effects of which continue to the present day." *Id.*

at 1261. The court held that "the disproportionate impact suffered by black Tenneseans does not 'result' from the state's qualification of the right to vote on account of race or color." *Id.* at 1262. It concluded that section 2 was not violated because the denial of the right to vote was not on account of race but rather on account of the felon's decision to commit a crime. *Id.*

The Third Circuit has also made it clear that statistical disparities aren't enough to support a section 2 vote denial claim. *Ortiz* upheld a Pennsylvania statute that purged voters' names from the rolls if they failed to vote for two years, disparately impacting minority voters. 28 F.3d at 307. The court held that statistical disparities weren't enough; plaintiffs in section 2 vote denial cases must demonstrate a "causal connection between the challenged electoral practice and the alleged discrimination that results in a denial or abridgment of the right to vote." *Id.* at 310.

Section 2 vote denial claims based only on disparities are also dead on arrival in the Fourth Circuit. *Irby* upheld Virginia's system of appointing members of its school boards. 889 F.2d at 1358-59. Despite the existence of a "significant disparity" between the percentage of blacks in the population and the percentage of blacks on the school board, *id.* at 1358, the court held that "[t]he evidence cast considerable doubt on the existence of a causal link between the appointive system and black underrepresentation in Buckingham and Halifax counties," *id.* at 1359. Rather, the disparity existed because, "although blacks comprise a large portion of the population, they are not seeking school board

seats in numbers consistent with their percentage of the population." *Id.* at 1358 (internal quotation marks and citations omitted).

Salas also rejected a section 2 vote denial challenge because it was based entirely on statistical disparities. Plaintiffs challenged an at-large voting system based on the disparities in turnout rates of white and minority voters. 964 F.2d at 1556. The evidence revealed that minority voter turnout was about seven percentage points below white voter turnout, but the court held that "a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote." *Id.* at 1556. Plaintiffs' section 2 claim failed because the cause of the disparity in turnout rates wasn't intentional race discrimination.

2. Under section 2, courts must evaluate the "totality of the circumstances" in which the challenged voting law operates to determine whether plaintiffs have been denied the right to vote based on their race. 42 U.S.C. § 1973(b); *Salt River,* 109 F.3d at 594. The panel reverses summary judgment although plaintiffs haven't demonstrated that the "totality of the circumstances" point to vote denial on account of race. Plaintiffs have not produced any evidence relating to the nine Senate factors we must weigh under that test, S.Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07, beyond statistical disparities in the criminal justice system. They have no evidence of a history of official discrimination in voting, no evidence of racially polarized voting, no evidence of voting practices or procedures often used to discriminate against minorities, no evidence of discrimination in

candidate slating, no evidence of discrimination in health, education or employment, no evidence of racial appeals in campaigns, no evidence that minorities have a harder time winning elections, no evidence that representatives are unresponsive to minority communities and no evidence that felon disenfranchisement is an unjustified policy. Plaintiffs have utterly failed to meet their burden of producing evidence showing vote denial on account of their race.

Plaintiffs in other cases have lost section 2 vote denial claims even though they produced much stronger evidence than the plaintiffs here. In *Ortiz,* the Third Circuit upheld under the "totality of the circumstances" Pennsylvania's voter purge statute though it disproportionately impacted minority voters. The *Ortiz* plaintiffs had evidence of racially polarized voting, racial appeals in elections, unresponsiveness by elected officials, lower minority voter turnout and disparities in employment and other non-voting areas. *Id.* at 312. Nonetheless, the fact that "there was no evidence of historical voting-related discrimination ... no evidence of discrimination in the candidate slating process that denied minority candidates equal access to the political process .... [and no] evidence that minorities experience difficulty in electing representatives of their choice," *id.*, led the court to conclude that section 2 had not been violated, *id.* at 313. *See also Burton v. City of Belle Glade,* 178 F.3d 1175 (11th Cir.1999) (rejecting a section 2 challenge even in the face of past intentional discrimination).

The panel tries to pass off evidence of disparities as evidence of intentional discrimination, but the two

have entirely different consequences for vote denial claims. Intentional discrimination in the criminal justice system, if it interacts with a standard, practice or procedure with respect to voting, could amount to illegal vote denial on account of race. *See Johnson v. Governor of the State of Florida,* 353 F.3d 1287 (11th Cir.2003). To the extent the district court's decision granting defendants' motion for summary judgment was based on its misunderstanding of section 2 and belief that evidence of intentional discrimination external to voting could never be taken into account, it was wrong. However, the result it reached was correct because, even under the correct standard, plaintiffs have not produced evidence of intentional discrimination to survive summary judgment.

3. Because the district court's decision granting summary judgment was correct, even if for the wrong reasons, it must be affirmed. The panel's decision to reverse and remand--on a settled record containing nothing more than evidence of disparities--flies in the face of a solid wall of circuit precedent holding that "[i]f the decision below is correct, it *must* be affirmed, even if the district court relied on the wrong grounds or wrong reasoning." *Jackson v. S. California Gas Co.,* 881 F.2d 638, 643 (9th Cir.1989) (emphasis added). *Accord Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.,* 159 F.3d 412, 418 (9th Cir.1998); *Unigard Sec. Ins. v. Lakewood Eng'g & Mfg. Corp.,* 982 F.2d 363, 367 (9th Cir.1992). Moreover, the panel's remand order is hopelessly ambiguous, directing the district court to "make any requisite factual findings following an appropriate evidentiary hearing, if necessary, and assess the totality of the circumstances." Slip op. at 10147-48.

There is no authority for such a sloppy remand order, which tells the district court it may reconsider summary judgment or make findings after an evidentiary hearing, without any instruction as to when such a hearing might be appropriate. The panel misunderstands its task at this stage. Under *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), a party is *entitled* to summary judgment if the opposing party has failed to present a genuine dispute of fact on a material issue. *Id.* at 322-23, 106 S.Ct. 2548. Because plaintiffs have failed to present evidence of intentional discrimination, summary judgment is the only option.

4. The panel's decision suffers from a more fundamental flaw: It ignores the fact that the VRA was never intended to reach felon disenfranchisement laws. When Congress enacted the VRA in 1965, it was careful to carve out an exception for felon disenfranchisement laws. The House and Senate Judiciary Committee Reports clearly bear this out. The Senate Report explains that the ban on "good moral character" tests contained in section 1973b(c) of the statute "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony.... It applies where lack of good moral character is defined in terms of a conviction of lesser crimes." S.Rep. No. 89-162, *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (joint views of Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott and Javits). The House Report also explains that the Act does "not proscribe a requirement of a State or any

political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony." H.R.Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457. This legislative history demonstrates that Congress recognized the long tradition of felon disenfranchisement laws when it enacted the VRA. Moreover, it distinguishes those provisions from other electoral qualifications that the VRA has been held to reach, such as literacy tests, which do not in and of themselves violate the Constitution. *See, e.g., Katzenbach v. Morgan,* 384 U.S. 641, 645 n. 3 & 646-47, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) (upholding ban on literacy tests targeted to deal with disenfranchisement of Puerto Ricans in New York even after upholding their constitutionality in *Lassiter v. Northampton Elections Board,* 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959)); *see also Baker v. Pataki,* 85 F.3d 919, 928 (2d Cir.1996) (opinion of Mahoney, J.).

When Congress enacted the "results" test as part of the 1982 amendments to the VRA, it was primarily concerned with whether section 5 of the Act--the provision placing special requirements on jurisdictions with a history of past discrimination--was still necessary. The debate surrounding section 2 focused mainly on whether the results test would require proportional representation by race. *See generally* S.Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177; Jennifer G. Presto, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After* City of Boerne, 59 N.Y.U. Ann. Surv. Am. L. (forthcoming 2004). There was no evidence that felon disenfranchisement laws were being used in a discriminatory manner, nor any discussion of felon disenfranchisement at all. There

is thus no evidence that Congress had changed its mind about the legitimacy of felon disenfranchisement when it enacted section 2. *See Johnson,* 353 F.3d at 1316-18 (Kravitch, J., dissenting) (demonstrating that Congress never intended the VRA to reach felon disenfranchisement laws).

In fact, Congress has since enacted laws making it easier for states to keep felons off the voting roster. In 1993, Congress enacted the National Voter Registration Act (NVRA), Pub. L. No. 103-31, 107 Stat. 77 (1993), which clearly lists conviction of a felony as a justification for cancellation of a voters' registration. 42 U.S.C. § 1973gg-6(a)(3)(B). Congress even instructed federal prosecutors, "[o]n the conviction of a person of a felony in a district court of the United States," to "give written notice of the conviction to the chief State election official." 42 U.S.C. § 1973gg-6(g). The NVRA also provides that "[o]n request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States may have concerning the offender and the offense of which the offender was convicted." 42 U.S.C. § 1973gg-6(g)(3).

Congress drafted federal prosecutors to help states disenfranchise felons even as it enacted the NVRA to extirpate certain registration practices that dampen minority participation in the political process. 42 U.S.C. § 1973gg(a)(3). It's thus crystal clear that felon disenfranchisement wasn't one of the practices about which Congress was concerned. We are bound

to respect that legislative judgment--not override it.

5. There is yet a more fundamental problem with extending the VRA to reach felon disenfranchisement laws: Doing so seriously jeopardizes its constitutionality.

"[A]ny attempt by Congress to subject felon disenfranchisement provisions to the 'results' methodology of [the VRA] would pose a serious constitutional question concerning the scope of Congress's power to enforce the Fourteenth and Fifteenth Amendments," *Baker,* 85 F.3d at 930, because "felon disenfranchisement is a very widespread historical practice that has been accorded explicit constitutional recognition in § 2 of the Fourteenth Amendment," *id.* at 928; *see also Richardson v. Ramirez,* 418 U.S. 24, 54, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974).

Unlike any other voting qualification, felon disenfranchisement laws are explicitly endorsed by the text of the Fourteenth Amendment. *Id.; see also Johnson,* 353 F.3d at 1314-16 (Kravitch, J., dissenting); *Baker,* 85 F.3d at 930. They are presumptively constitutional. Only a narrow subset of them-- those enacted with an invidious, racially discriminatory purpose--is unconstitutional. *Hunter v. Underwood,* 471 U.S. 222, 233, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). If Congress had intended the VRA to reach felon disenfranchisement laws, the only constitutional violations it had authority to remedy are the type recognized in *Hunter:* the purposeful, invidious use of those laws to deprive minorities of the right to vote.

Hunter violations, however, are exceedingly rare. *See Developments in the Law--The Law of Prisons,* 115 Harv. L. Rev. 1939, 1951-52 (2002). *Hunter* involved a provision of the Alabama Constitution of 1901 that denied the right to vote to persons who had committed crimes of "moral turpitude." The 1901 Constitution was an egregious example of post-Reconstruction disenfranchising constitutions. Accordingly, plaintiffs were able to produce a mountain of evidence of discriminatory intent in its passage, together with evidence of a continuing discriminatory effect in its application, and the Court struck it down as a violation of the Fourteenth Amendment. Alabama's provision, with its dubious provenance, stands far apart from the legitimate, neutral provision of the Washington Constitution at issue in this case. Washington does not share Alabama's long history of race discrimination. It has never been a covered state under section 5 of the VRA. Its felon disenfranchisement provision dates back to 1866, *see State v. Collins,* 69 Wash. 268, 270-71, 124 P. 903 (1912), four years before the Fifteenth Amendment extended the right to vote to blacks. Therefore Washington's felon disenfranchisement provision couldn't have been enacted with the intent of depriving minorities of the vote. In fact, plaintiffs' constitutional claim was so weak that it was dropped shortly after it was made.

In *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Supreme Court warned that legislation enforcing constitutional rights--such as the VRA--can do no more than remedy or prevent actual constitutional violations, as defined by the Supreme Court. *Id.* at 519, 117 S.Ct. 2157. Congress cannot alter the substantive

constitutional right in an attempt to enforce it. *Id.* To ensure that Congress is merely enforcing--not altering--the substantive right, courts must police the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520, 117 S.Ct. 2157.

Time and again, the Supreme Court has insisted that section 5 enforcement legislation be supported by a record of constitutional violations. In *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), the Court invalidated an amendment to the VRA which would have extended the vote to 18-year-olds in state and local elections. Justice Black, who announced the judgment of a fractured Court, explained: "Congress had before it a long history of the discriminatory use of literacy tests to disenfranchise voters on account of their race," *id.* at 132, 91 S.Ct. 260, but "Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race," *id.* at 130, 91 S.Ct. 260. Securing the right to vote for 18-year-olds required passage of the Twenty-Sixth Amendment in 1971.

More recently, in *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 374, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), the Court held that the Americans with Disabilities Act was an invalid attempt to enforce the Fourteenth Amendment against the states because Congress did not make findings establishing a pattern of unconstitutional irrational job discrimination by the states. Likewise, *Kimel v. Florida Board of Regents,* 528 U.S. 62, 91, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), held that Congress failed to amass sufficient evidence of

widespread irrational age discrimination in violation of the Fourteenth Amendment to justify application of the Age Discrimination in Employment Act to the states. *See also Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank,* 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). The Court has demonstrated that it's serious about policing the limits on Congress's enforcement powers, and we should be, too.

Congress could legitimately remedy *Hunter*-type violations, but it would have to have evidence that states were using felon disenfranchisement in a purposeful, invidious manner. However, "not only has Congress failed ever to make a legislative finding that felon disenfranchisement is a pretext ... for racial discrimination[,] it has effectively determined that it is not." *Baker,* 85 F.3d at 929. This sharply distinguishes felon disenfranchisement provisions from literacy tests because "[t]he legislative history of the 1970 Amendments [banning literacy tests] contains substantial information upon which Congress could have based a finding that the use of literacy tests ... deny [ ] the vote to racial minorities." *Oregon v. Mitchell,* 400 U.S. at 234, 91 S.Ct. 260 (Brennan, J., concurring).

Here, there is no "pattern of unconstitutional discrimination on which § 5 [enforcement] legislation must be based." *Garrett,* 531 U.S. at 370, 121 S.Ct. 955; *cf. Nev. Dept. of Human Res. v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 1981, 155 L.Ed.2d 953 (2003) (upholding the FMLA because Congress had a sufficient evidentiary basis for that legislation). Congress was apparently confident enough in the legitimacy of state laws disenfranchising felons to

expressly sanction cancellation of a voter's registration based on conviction of a felony and direct federal prosecutors to help states in that endeavor in the 1993 National Voter Registration Act. *See* p. 12 *supra.* Without a record proving that most of the state felon disenfranchisement laws prohibited by section 2 would be unconstitutional on their own, the vast overinclusiveness of section 2 as interpreted by the panel dooms it. *See Boerne,* 521 U.S. at 532, 117 S.Ct. 2157. The theoretical, undocumented threat of unconstitutional felon disenfranchisement laws simply doesn't justify such a broad remedy.

In contrast to the expansive reading of section 2 adopted by the panel today, our parsimonious interpretation of that provision in *Salt River* preserved its constitutionality. A state whose criminal justice system is infected with actual intentional race discrimination might be more likely to have an unconstitutional felon disenfranchisement law. "*[P]urposeful* governmental discrimination outside the electoral system might play out within the electoral system, where it would be observed in the disparate impact of otherwise acceptable policies. . . . Congress could . . . remedy the effects of that impermissible prior discrimination." Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L. Rev. 725, 728-29 (1998) (emphasis added). Section 2 is therefore a more congruent and proportional remedy if plaintiffs are required to produce evidence of intentional discrimination in an area external to voting which interacts with a voting practice to result in the denial of the right to vote on account of race. By allowing plaintiffs to survive summary judgment on a settled record containing

nothing but disparities in the criminal justice system, and absolutely no evidence of intentional discrimination, the panel destroys section 2's congruence and proportionality as a remedy for the kind of constitutional violations recognized in *Hunter*.

Section 2 might also be on firmer constitutional footing if it were tailored to areas with a history of discriminatory voting practices. For example, its congruence and proportionality might be stronger if plaintiffs had to produce evidence of a history of discrimination, not just the panel's requirement of a simple disparate impact. States with a long history of discrimination in voting might be more likely to use felon disenfranchisement laws to deprive minorities of the vote.

The Supreme Court has emphasized that enforcement legislation should be geographically targeted when the threat of violations varies from place to place. In *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), the Court struck down the Violence Against Women Act, noting that it "applies uniformly throughout the Nation. Congress's findings indicate that the problem of discrimination against the victims of gender- motivated crimes does not exist in all States, or even most States. By contrast, the § 5 remedy upheld in *Katzenbach v. Morgan*[, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966)] ... was directed only to the States where the evil found by Congress existed, and in *South Carolina v. Katzenbach* [, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)] ... the remedy was directed only to those States in which Congress found that there had been discrimination."

Morrison, 529 U.S. at 626-27, 120 S.Ct. 1740. *Boerne* also cited the special-coverage provisions of section 5 of the VRA as an example of a constitutional enforcement measure required by the threat of purposeful discrimination and emphasized its "confine[ment] to those regions of the country where voting discrimination had been most flagrant." 521 U.S. at 532-33, 117 S.Ct. 2157. In applying section 2 to felon disenfranchisement laws, the panel has handed us a sweeping remedy of its own creation that, like the statute invalidated in *Boerne,* "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in *Boerne,* 521 U.S. at 532, 117 S.Ct. 2157.constitutional protections."

It is unlikely that Congress could have reached felon disenfranchisement even if it wanted to, at least not without a substantial evidentiary record and a more tailored remedy. In interpreting the VRA to reach felon disenfranchisement in a state without a history of race discrimination like Washington, the panel has created a constitutional problem that Congress itself avoided.

The panel's decision seriously compromises the constitutionality of section 2. Despite a 1984 case summarily affirming a district court decision upholding its constitutionality, *see Mississippi Republican Executive Comm. v. Brooks,* 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984), section 2's constitutionality remains an open question. *See, e.g., Bush v. Vera,* 517 U.S. 952, 990, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (O'Connor, J., concurring);

Johnson v. De Grandy, 512 U.S. 997, 1028-29, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (Kennedy, J., concurring); *Chisom v. Roemer,* 501 U.S. 380, 418, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991) (Kennedy, J., dissenting). *See generally Holder v. Hall,* 512 U.S. 874, 891, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (Thomas, J., concurring in judgment, joined by Scalia, J.).

In recent years, the Court has repeatedly rejected broad interpretations of the VRA, obviously troubled by the constitutional implications. *Reno v. Bossier Parish School Board,* 528 U.S. 320, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000), refused to adopt a possible interpretation of section 5 of the VRA because "[s]uch a reading would also exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts" and raise concerns about the constitutionality of that provision. *Id.* at 336, 120 S.Ct. 866. In *Vera,* the Court held that the VRA does not require excessive reliance on race in districting because that would offend equal protection. 517 U.S. at 979-81, 116 S.Ct. 1941. Likewise, *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), rejected the Justice Department's interpretation of section 5 of the VRA and held that "[t]here is no indication Congress intended such a far-reaching application of § 5, so we reject the [proposed] interpretation of the statute and avoid the constitutional problems that interpretation raises." *Id.* at 927, 115 S.Ct. 2475. *See generally Holder,* 512 U.S. at 885, 114 S.Ct. 2581 (O'Connor, J., concurring in part and concurring in the judgment); *Presley v. Etowah County Comm'n,* 502 U.S. 491, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992). Jurists and commentators alike recognize the constitutional

pitfalls of interpreting section 2 too broadly. *See, e.g., Johnson,* 353 F.3d at 1314 (Kravitch, J., dissenting); *Goosby v. Town of Hempstead,* 180 F.3d 476, 502 n. 4 (2d Cir.1999) (Leval, J. concurring) ("Requiring discriminatory intent to prove vote dilution [claims under section 2] reduces the otherwise serious tension between section 2 and constitutional principles."); Theane Evangelis, *The Constitutionality of Compensating for Low Minority Voter Turnout in Districting,* 77 N.Y.U. L. Rev. 796, 798 (2002); Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 Harv. L. Rev. 1663, 1737 (2001); Karlan, *supra,* at 725-26; Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 749-52 (1998). *See also* Samuel Issacharoff, Richard H. Pildes & Pamela S. Karlan, *The Law of Democracy: Legal Structure of the Political Process* 741-42, 859-66 (2001). It is our job to side-step those pitfalls whenever possible.

We have a duty to recognize limitations on congressional power and avoid interpreting statutes in a way that would extend these powers beyond constitutional limits. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Del. & Hudson Co.,* 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909); *see also Feltner v. Columbia Pictures Television, Inc.,* 523 U.S. 340, 356, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998) (Scalia, J., concurring in judgment). My colleagues fail in their duty *not* to adopt a constitutionally deficient interpretation of the VRA.

6. The panel's decision has far-reaching consequences. As long as there are statistical disparities by race in the criminal justice system and consequently in the rate of felony conviction, the panel's interpretation of the VRA will require states to erect voting booths in prisons. This result is inevitable, as there is no stopping point to the panel's rationale. If states can't exclude felons formerly incarcerated from the franchise, then they surely can't exclude felons currently behind bars. Once felons have a right to vote, someone will bring suit to require the states to bring the polls to them, since they can't go to the polls themselves.

Yet every state in our circuit--indeed, every state in the country save Maine and Vermont--does not allow imprisoned felons to vote. Human Rights Watch, The Sentencing Project, *Felony Disenfranchisement Laws in the United States, available at* http://www.sentencingproject.org/pdfs/1046.pdf. Arizona, Nevada and Washington do not allow ex-felons to vote. Alaska and California also prohibit paroled felons from voting, and Alaska extends that prohibition to those on probation. Moreover, race-based statistical disparities in the rate of felon disenfranchisement exist in every state in our circuit. Human Rights Watch, The Sentencing Project, *Losing the Vote,* at 9, *available at* http:// sentencingproject.org/pdfs/9080.pdf.

The panel's decision also has widespread implications for other legitimate state electoral practices. All sorts of state and local decisions about the time, place and manner of elections will be subject to attack by anyone who can show a

disparate impact in an area external to voting that translates into a disparate impact on voting.

For example, according to the 2000 census, minorities have lower incomes than whites. Carmen DeNavas-Walt et al., *Money Income in the United States: 2000,* at 2 tbl.A, *available at* http://ict.cas.psu.edu/resources/Census/PDF/C2K_Income_in_USA.pdf. People with lower incomes are less likely to participate in the political process. *See* R. Michael Alvarez & Jonathan Nagler, *The Likely Consequences of Internet Voting for Political Representation,* 34 Loy. L.A. L. Rev. 1115, 1121 (2001). Evidence of socioeconomic disparities could be the source of countless lawsuits. Plaintiffs will doubtless claim that those disparities lead to disparities in turnout, which lead to a disparate impact on minority voters, if states choose to purge their voter registration lists of the names of voters who have not recently participated in order to combat voting fraud. This is precisely the claim rejected by the Third Circuit in *Ortiz,* but the panel's decision would make it possible in our circuit.

After the panel's decision, plaintiffs could bring a section 2 challenge based on statistical disparities if states adopt Internet voting, which Arizona already tested in the 2000 Democratic presidential primary. *See* Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times,* 34 Loy. L.A. L. Rev. 1171, 1172 (2001); *see also* Eben Moglen & Pamela S. Karlan, *The Soul of a New Political Machine: The Online, the Color Line and Electronic Democracy,* 34 Loy. L.A. L. Rev. 1089, 1089 (2001) ("The digital divide means that minority citizens have less access to web-based

sources of political information and may be less able to use voting techniques, such as online voting, that require a computer."); Alvarez & Nagler, *supra,* at 1135. Plaintiffs could show disparities in wealth, leading to disparities in computer ownership and Internet access, leading to disparities in participation on election day. The authors of a study of Arizona's test-drive of Internet voting concluded that "non-white voters did not vote on the Internet as often as whites, so the Internet voting option seems unlikely to improve the voting rights of minorities. Instead, Internet voting seems likely to weaken the voting rights of minorities, as in this particular case minority turnout dropped substantially more than did white turnout." Alvarez & Nagler, *supra,* at 1147.

Holding elections on a Tuesday could be a thing of the past if a plaintiff somewhere can show that minority voters are disproportionately more likely to be hourly wage earners, who are disproportionately less likely to vote because they can't take time off from work. *See* Nat'l Comm'n on Fed. Election Reform, To Assure Pride and Confidence in the Electoral Process 40-42 (2001), *available at* http://www.reformelections.org/data/reports/99_full_report.pdf. Under the panel's rationale, elections would have to be held on weekends or holidays.

The permutations are endless. The bottom line is that virtually every decision by a state as to voting practices will be vulnerable, no matter how unrelated to race. The fallout from the panel's decision will be felt for a long time to come.

* * *

Every state in our circuit bars felons from the voting booth. The panel's decision will change all that. It contradicts our case law and the law of at least four other circuits, making us an outlier in voting rights jurisprudence. It does so without so much as acknowledging congressional approval of felon disenfranchisement and without any consideration of the grave constitutional consequences of its actions. I am troubled not only by my colleagues' insistence on an indefensible interpretation of the Voting Rights Act, but also by their utter disregard for our precedent. I dissent.

[FILED]

[DEC. 01, 2000]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MUHAMMAD SHABAZZ FARRAKHAN, et al.,	)	NO.CV-96-00076-RHW
Plaintiffs,	)	ORDER GRANTING DEFENDANTS' MOTION
v.	)	FOR SUMMARY JUDGMENT AND
GARY LOCKE, et al.,	)	DENYING PLAINTIFFS' MOTION FOR
Defendants.	)	SUMMARY JUDGMENT

Before the Court are Defendants' motion for summary judgment (Ct. Rec. 127), and Plaintiffs' motion for summary judgment. (Ct. Rec. 134). Oral argument was heard on these motions on November 3, 2000. Larry Weiser, Dennis Cronin, and legal intern Jason Vail appeared on behalf of Plaintiffs. Daniel Judge and Jeffrey Even appeared on Defendants' behalf. For the reasons below, Defendants' motion is granted and Plaintiffs' motion is denied.

RELEVANT FACTS

The facts are not in dispute. Plaintiffs are convicted felons, and are also African-American, Hispanic-American, or Native American. Each Plaintiff has been disenfranchised under Wash. Const. Art. VI § 3, which denies the right to vote to all

persons convicted of an "infamous crime." None of the Plaintiffs have had their civil rights restored under Wash. Rev. Code § 9.94A.220. Plaintiffs allege that Washington's felon disenfranchisement and restoration of civil rights schemes result in the denial of the right to vote to racial minorities in violation of the Voting Rights Act, 42 U.S.C. §§ 1971, 1973. Both sides move for summary judgment on all issues.

ANALYSIS

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, "the evidence of the non-movant is to believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986).

1. Felon disenfranchisement.

Plaintiffs move for summary judgment on their allegation that Washington's felon disenfranchisement scheme constitutes improper race-based vote denial in violation of Voting Rights Act ("VRA"). Specifically, Plaintiffs argue that race bias in, or the discriminatory effect of, the criminal justice system results in a disproportionate number of racial minorities being disenfranchised following felony convictions. Defendants also move for summary judgment, arguing that: (1) Plaintiffs' claims are barred by the doctrines of *Rooker-Feldman* or res judicata because they necessarily imply the invalidity of Plaintiffs' criminal convictions; (2) Plaintiffs cannot bring a VRA suit because they are disenfranchised; and (3) the totality

of the circumstances establishes that Plaintiffs were not denied the right to vote on the basis of race.

The Court concludes that Washington's felon disenfranchisement provision disenfranchises a disproportionate number of minorities; as a result, minorities are under-represented in Washington's political process. Analyzing the disenfranchisement provision under the totality of the circumstances illustrates that the cause of this reduction is not the voting qualification; instead, the cause is bias external to the voting qualification. Although racial minorities are clearly being disenfranchised in numbers disproportionate to that of their white fellow citizen, the Court is compelled by controlling Ninth Circuit authority to conclude that this disproportionate impact is not sufficient to provide a legal remedy under the Voting Rights Act ("VRA") because Plaintiffs have failed to establish a causal connection between the disenfranchisement provision and the prohibited result.

As an initial matter, the Court must construe the scope of Plaintiffs' claims; specifically, the Court must determine whether Plaintiffs claim that the disenfranchisement provision is invalid as applied to their particular cases, or whether the challenge more generally alleges that the provision is facially invalid with respect to all racial minorities. The *Rooker-Feldman* doctrine bars any as-applied challenge because such a challenge would require the Court to scrutinize both the challenged disenfranchisement provision and the State court's application of that provision to a particular set of facts. *See Dubinka v. Superior Court*, 23 F.3d 218, 222 (9th Cir. 1994). Even if the *Rooker-Feldman* bar was inapplicable, and the Court construed Plaintiffs' claims as an as-applied challenge[1], there is no evidence in the record that

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[1] Such a challenge may well be more appropriate in light of the fact that Plaintiffs' allege vote denial instead of vote dilution. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 188 n.8, 21

Plaintiffs' individual convictions were born of discrimination in the criminal justice system. The Court construes Plaintiffs' vote denial claims as a facial challenge to the validity of Washington's disenfranchisement provision.[2]

However, Plaintiffs' vote denial claims create a constitutional problem when construed as a facial challenge. The voting qualification at issue in this case is somewhat unique; unlike other voter qualifications that have previously been invalidated under the Voting Rights Act, such as literacy tests or poll taxes, *see Oregon v. Mitchell*, 400 U.S. 112, 132-33 (1970), a felon disenfranchisement provision is not inherently or inevitably discriminatory. To the contrary, felon disenfranchisement is specifically authorized by the Fourteenth Amendment. *See* U.S. Const. Amend. XIV § 2. Although felon disenfranchisement provisions can be constitutionally infirm if enacted with a discriminatory intent, *see Hunter v. Underwood*, 471 U.S. 222 (1985), racially-neutral provisions can permanently disenfranchise felons without running afoul of the Constitution. *See Richardson v. Ramirez*, 418 U.S. 24 (1974). If the Court ultimately concluded that Washington's provision was invalid with respect to racial minorities, then only white felons could be disenfranchised so long as racial bias existed in the criminal justice system. That would obviously create an Equal Protection

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(11th Cir. 1999). Due to the ambiguity in the law in this area, the Court analyzes Plaintiffs' claims under both rubrics.

[2] This construction also avoids any res judicata bar. Res judicata is further inapplicable since Defendants, the parties urging application of the bar, have not brought forth any evidence that Plaintiffs were afforded a full and fair opportunity to litigate the disenfranchisement issue during their criminal prosecutions. At most, Plaintiffs could have challenged the facts underlying their convictions; that is not equivalent to challenging the subsequent disenfranchisement, which, according to Defendants, flows automatically by operation of law upon conviction of a felony.

problem. Fortunately, this is not a conflict between two constitutional doctrines. Instead, any conflict is between a statutory VRA claim and a constitutional claim. Since Plaintiffs' remedy would create a new constitutional problem, the Court is compelled to read the VRA in a manner that does not lead to the conclusion Plaintiffs urge. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' This doctrine is followed out of respect for Congress, which we assume legislates in light of constitutional limitations."), *quoting United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).[3]

Aside from the constitutional conflict, the Court concludes that the totality of circumstances does not establish the requisite causal link between Washington's felon disenfranchisement provision and reduced minority access to Washington's political process. To prevail on their VRA claims, Plaintiffs must establish that the State employs a voting "standard, practice or procedure" that results in the denial or abridgement of the right to vote on account of race. 42 U.S.C. § 1973(a). The VRA envisions a totality of circumstances test, under which the Court is "to determine, based 'upon a searching practical evaluation of the past and present reality' whether the

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[3] There is no conflict between this conclusion and the Fifteenth Amendment, which provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV § 1. The Fifteenth Amendment, upon which the VRA was patterned, does not affirmatively bestow a right to vote; instead, it merely says that the voting rights of racial minorities shall not be less than those of white citizens. If the Court were to conclude that the disenfranchisement provision was invalid under the VRA as applied to minorities, and that it could only be used to disenfranchise white felons, this would bestow voting protections on minorities beyond those created by the Fifteenth Amendment.

political process is equally open to minority voters.'" *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (citation omitted).[4] Although Plaintiffs need not show that discriminatory intent underlies the challenged voting qualification, "a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry. Instead, '[s]ection 2 plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result.'" *Smith v. Salt River Agricultural Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997), *quoting Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F.3d 306, 312 (3d Cir. 1994).

The most striking thing about this case is that, although the disenfranchisement provision clearly has a disproportionate impact on racial minorities, there is no evidence that the provision's enactment was motivated by racial animus, or that its operation *by itself* has a discriminatory effect. Instead, a discriminatory effect arises, if at all, only when the provision operates in light of discriminatory activity in the criminal justice system. Stated differently, if there were no discriminatory motivation or effect in the criminal justice system, then there is no evidence that the disenfranchisement provision would have a discriminatory effect. At most, this establishes a flaw with the criminal justice system, not with the disenfranchisement provision. Plaintiffs have failed to establish a claim for vote denial because the causal chain runs, if at all, to a factor outside of the challenged voting mechanism. If the Court concluded that such evidence was sufficient to establish causation, it would effectively broaden the VRA to

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[4] The Court in *Thornburg* identified several non-exclusive factors that trial courts could use in making this determination. *See Thornburg*, 478 U.S. at 44-45, *quoting* S.Rep. No. 97-417 at 28-29, reprinted in 1982 U.S.C.C.A.N. at 206-07. The Court considers these factors illustrative of the type of considerations generally relevant in VRA cases, but declines to rigidly structure its analysis along this framework for the present case.

provide a remedy for societal discrimination outside the context of voting.

Plaintiffs have not offered any evidence of a "history of official discrimination in the state . . . that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process," *Thornburg*, 478 U.S. at 36-37, such as to lead the Court to conclude that the circumstances surrounding the disenfranchisement's provision created an inference of discriminatory intent or a causal connection between the provision and the result. To the contrary, Washington has historically been very liberal in extending elective franchise to racial minorities. *See* Affidavit of Dr. Quintard Taylor at ¶¶ 17, Ct. Rec. 130, ex. 47 (concluding that Washington's political process has historically been open to minorities, and that its felon disenfranchisement provision was not intended to disenfranchise racial minorities); Deposition of Dr. Quintard Taylor, p. 38, ll. 3-14, Ct. Rec. 13, ex. 11 (same). Plaintiffs concede that Washington has no history of official acts aimed at limiting the voting rights of African-Americans, but cite 2 examples allegedly evidencing a political climate hostile to minorities at the time the Washington Constitution was drafted: (1) a proposed constitutional provision barring persons of Chinese descent from voting; and (2) the exclusion of "Indians not taxed" from voter roles in Washington's Constitution as originally drafted.[5] Plaintiffs' first example is not evidence of

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[5] Plaintiffs also suggest that the fact that felon disenfranchisement provisions were adopted in other states with the intent to disenfranchise minorities indicates that any such provision is somehow inherently bad. The Court disagrees. The disenfranchisement provision is itself facially neutral, and the Supreme Court has concluded that a State can permanently disenfranchise a felon. *See Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). Absent any evidence that Washington's disenfranchisement provision had some discriminatory intent, the fact that other statutes were so intended is of no consequence.

discrimination; to the contrary, the delegates' rejection of this proposal evidences an intent to promote or delimit minority voting.[5] This rejection is particularly significant because it occurred at a time when anti-Chinese attitudes were prevalent in the Pacific Northwest. *See* Affidavit of Quintard Taylor at ¶15, Ct. Rec. 130, ex. 47. Similarly, the original exclusion of "Indians not taxed" from Washington's voter roles has a much more benign explanation than that suggested by Plaintiffs when viewed in historical context. Most Native Americans were not legally regarded as full citizens of the United States until 1924. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). *See also* Wash. Rev. Code § 75.56.040. Reservation land and Native Americans living on reservations were historically regarded as beyond the State's taxing power. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 169 (1973). Accordingly, a voting qualification omitting "Indians not taxed" merely distinguishes between citizens and non-citizens of a state.[7] This interpretation is consistent with Washington case-law. *See Anderson v. O'Brien*, 84 Wash.2d 64, 85-86 (1974) (Hale, C.J., dissenting).

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6 A delegate to the Washington Constitutional Convention proposed that Article VI § 3 (voter qualifications) be drafted "[t]o deny the vote to Chinese, idiots, insane, one convicted of an infamous crime, or hereafter of embezzlement of public funds." Journal of the Washington State Constitutional Convention 1889 at 638 (Beverly Paulik Rosenow, ed., 1962). This proposal was read and referred to the Committee on Elections and Elective Rights. *Id.* at 61. The Committee deleted all reference to ethnicity, and reintroduced an amended version stating that "[a]ll idiots, insane persons and persons convicted of infamous crimes are excluded from the elective franchise." *Id.* at 290.

7 Notably, this same distinction is made in the 14th Amendment. *See* U.S. Cons. Amend. XIV § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, *excluding Indians not taxed.*") (emphasis added).

Plaintiffs' evidence of discrimination in the criminal justice system, and the resulting disproportionate impact on minority voting power, is compelling; however, it is not enough to establish a causal link under controlling Ninth Circuit authority. As explained above, *Salt River* requires more than a showing of disproportionate impact, and it is well-established that "[d]istrict courts are bound by the law of their own circuit." *Hasbrouck v. Texaco,* Inc., 663 F.2d 930, 933 (9th Cir. 1981). Even if Plaintiffs established that the disproportionate representation of minorities in the criminal justice system was due to discriminatory animus on the part of prosecutors and judicial officials, this would not establish a causal connection between the voting qualification and the prohibited result in this case because it is discrimination in the criminal justice system, not the disenfranchisement provision itself, that causes any vote denial.[8] Accordingly, evidence of discrimination in the criminal justice system is only useful for establishing a generalized climate of discrimination which hinders minority opportunity to participate in the political process. The Court concludes that such evidence, by itself, is not sufficient to establish a causal link between the voting qualification and the prohibited result. The Eleventh Circuit faced an analogous situation in *Burton v. City of Belle Glade,* 178 F.3d 1175, 1198 (11th Cir. 1999). In that case, the plaintiffs argued that historical discrimination and segregation in housing caused a concentration of African-Americans in a particular neighborhood outside the city limits, and that the city's refusal to annex the neighborhood into its boundaries, thereby allowing the neighborhood's residents to participate in city elections, improperly diluted the voting strength of minority voters within the city limits and denied the voting rights of minorities living beyond the city

[8] By way of analogy, a criminal statute under which a minority defendant is prosecuted might be a vehicle by which a discriminatory result, a conviction, is obtained by a racially-biased prosecutor. However, that does not mean that the criminal statute causes the discriminatory result.

limits. The circuit acknowledged that historical patterns of housing discrimination had segregated the African-American community in the neighborhood beyond the city limits, but held that this evidence was insufficient to establish a VRA violation because "[a]lthough Appellants have presented evidence of housing segregation in Belle Glade and in the two centers, we can find no evidence of any discrimination with respect to *voting*". *Id.* at 1198 (emphasis in original). While not binding upon this Court, the Eleventh Circuit's decision in *Burton* is helpful in weighing the significance of Plaintiffs' evidence.

The probative value of Plaintiff's evidence of discrimination in the criminal justice system is further limited since it reflects, at most, discriminatory animus on the part of the executive and the judicial branches; there is no evidence that the legislative branch, which controls voter qualifications[9], continues to cling to the disenfranchisement provision out of animus, or that it is unaware of or unresponsive to disproportionate minority representation in criminal prosecutions. Instead, the record indicates that Washington's Legislature has historically enacted protections for minorities in areas aside from voting qualifications. *See* 1890 Act, Ct. Rec. 130, ex. 68; Taylor affid. at ¶ 14, Ct. Rec. 130, ex. 47. Despite these efforts, the evidence presented by Plaintiffs clearly demonstrates that the disenfranchisement provision continues to disproportionately impact minority voting strength. Any change prompted by this evidence in this area, however, must come from the Washington Legislature; the disproportionate impact evidence is legally insufficient to establish causation under the VRA.

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[9] Since the felon disenfranchisement provision is part of Washington's Constitution, a constitutional amendment would be required to amend or repeal it. Pursuant to Wash. Const. Art. XXIII § 1, such amendments may be introduced to the Legislature, and must receive two-thirds approval prior to being subjected to a public vote.

Finally, there is no evidence from which the Court could conclude that the criminal justice system is so inherently flawed that application of the disenfranchisement provision inevitably results in minority vote denial. Plaintiffs have presented no evidence that their own criminal prosecutions were the result of discriminatory animus, or that they were anything but race-neutral. The fact that there is no indication that the disenfranchisement provision functioned in a discriminatory manner or had discriminatory effect in these particular Plaintiffs' cases demonstrates that the cause of discriminatory effect is not inherent in the provision.

Based upon the foregoing, the Court concludes that the totality of circumstances does not establish the requisite causal link between Washington's felon disenfranchisement provision and reduced minority access to Washington's political process.[10]

2. Restoration of civil rights.

Plaintiffs allege that Washington's scheme for restoration of civil rights violates the VRA because civil rights are not automatically restored upon completion of the terms of a felony sentence; instead,

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[10] Defendants also argue that Plaintiffs lack standing to bring a VRA claim because they are disenfranchised. Although not at issue in this case, Plaintiffs' disenfranchisement probably bars them from bring a vote dilution claim. *See Burton City of Belle Glade*, 178 F.3d 1175, 1188 n.8 & n.21 (11th Cir. 1999) (distinguishing between VRA vote dilution claims, which may only be brought by enfranchised members of adversely affected minority group, with VRA vote denial claims, which may only be brought by disenfranchised minority group members). Instead, the only avenue re redress under the VRA for disenfranchised minority voters is to bring a vote denial claim. If Defendants' interpretation were adopted, states could disenfranchise all minority voters without running afoul of the VRA. Such an interpretation is clearly illogical, and is contrary to the broad reading of the VRA favored by the Supreme Court. *See Chisom v. Roemer*, 501 U.S. 380, 403 (1991).

the restoration process is allegedly complex and difficult to complete. Defendants move for summary judgment, arguing that Plaintiffs lack standing, and that the process is not unduly burdensome.

Plaintiffs have failed to establish standing to challenge the restoration scheme because none of the Plaintiffs have presented evidence (or even alleged) that they are eligible for restoration and have attempted to have their civil rights restored. Plaintiff Farrakhan previously moved to amend the Complaint to add a substantive due process claim challenging the restoration scheme; the Court denied the motion on standing grounds, concluding that "[b]ecause Plaintiff Farrakhan is not yet eligible to seek reinstatement of his voting rights, his alleged injury is too speculative to support a cause of action challenging the constitutionality of the reinstatement provisions." *Farrakhan v. Locke*, 987 F. 1304, 1315 (E.D. Wash. 1997). This challenge falls victim to the same inadequacy.

Even if Plaintiffs had standing, the Court would still grant summary judgment to Defendants because there is no evidence that the restoration process unduly impacts minorities because of race. Having concluded that the initial disenfranchisement does not constitute improper race-based vote denial, the reinstatement process logically cannot be illegal unless the Court concludes that something in the process makes restoration difficult or impossible because of race. There is no evidence in the record that the process has such an effect or intent.

CONCLUSION

IT IS HEREBY ORDERED:

1. Defendants' motion for summary judgment **(Ct. Rec. 127)** is **GRANTED**. All of Plaintiffs' claims are **dismissed.**

2. Plaintiffs' motion for summary judgment **(Ct. Rec. 134)** is **DENIED.**

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 1st day of ~~November~~ December, 2000.

/s/
ROBERT H. WHALEY
United States District Judge

[FILED]
[NOV. 13, 1997]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

MUHAMMAD SHABAZZ FARRAKHAN, et al.,	)	NO.CV-96-00076-RHW
Plaintiffs,	)	ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS, AND DENYING IN PART PLANTIFFS' MOTION TO AMEND
v.	)	
GARY LOCKE, et al.,	)	
Defendants.	)	

Before the Court are Defendants' Motion for dismissal for Failure to State a Claim (Ct. Rec. 53) and Plaintiff's Motion for Leave to Amend (Ct. Rec. 66). A hearing was held in this matter on October 17, 1997. Dennis Cronin, Larry Weiser, Angel Rains, and George Vourvoulias appeared on behalf of Plaintiffs, Daniel Judge and Jeffrey Even appeared on behalf of Defendants.

As explained below, Defendants' motion to dismiss is granted as to Plaintiffs' claims for vote dilution under the Voting Rights Act ("VRA") and as to Plaintiff's constitutional claims. Defendant's motion is denied as to Plaintiffs' claims for vote denial under the VRA. Plaintiff's Motion for Leave

to Amend is denied, except to the extent that Plaintiff Bevan Maxey[1] is added as a party.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Farrakhan, Shaheed, Price, Barrientes, Schaaf, and Briceno are African-American, Hispanic-American and Native-American felons. They, along with other Plaintiffs who have since opted out, originally filed the instant action *pro se* on February 2, 1996, claiming that the State of Washington's felons disenfranchisement scheme violates the VRA as well as the First, Fourth, Fifth, Sixth, Ninth, Fourteenth and Fifteenth Amendments to the United States Constitution. Plaintiffs also lodged a complaint against the National Rifle Association ("NRA"), asserting that the NRA, along with state officials, orchestrated Initiative 593 (Washington's "three-strikes" law) with an intent to oppress racial minorities. Because none of the Plaintiffs asserted that they were incarcerated or disenfranchised under Initiative 593, the Court dismissed this claim *sua sponte* for lack of standing. The Court subsequently granted Plaintiffs' motion to assign counsel, and permitted Plaintiffs to amend their complaint. The amended complaint added Carl Maxey, and African-American registered voter, as a plaintiff, and asserted claims for relief under the VRA, and the First, Second, Fifth, Sixth, Seventh,

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[1] Carl Maxey, one of the original Plaintiffs in this matter, died during the pendency of this case. Subsequent to his death, Plaintiffs have filed a motion to amend their Complaint seeking, among other things, to add Bevan Maxey, Carl Maxey's son, as a named Plaintiff. For the purposes of this Order, this aspect of Plaintiffs' Motion to Amend is granted for appeal purposes, even though the claim for which the Maxeys have standing is dismissed, as explained below.

Eighth, Fourteenth, and Fifteenth Amendments to the United States Constitution.

The focus of the Plaintiffs' Complaint is Washington's felon disenfranchisement law. Under Washington's constitution, a person convicted of an "infamous crime" is ineligible to vote. Wash. Const. Art. VI, §§ 1 & 3. As defined by statute, an "infamous crime" is one that is "punishable by death in the state penitentiary or imprisonment in a state correctional facility." Wash. Rev. Code § 29.01.080. Although Washington provides for restoration of voting rights for certain felons[2], the plaintiff felons make no allegations that they have obtained this form of redress. The Complaint alleges that minorities are disproportionately prosecuted and sentenced, resulting in their disproportionate representation among the persons disenfranchised under the Washington Constitution. Consequently, Plaintiffs allege that Washington law causes vote denial and vote dilution on the basis of race, in violation of the VRA, as well as direct violations of the United States Constitution.

ANALYSIS

1. The Legal Standard Governing a Motion to Dismiss

Defendants move for dismissal under Fed. R. Civ. P. 12(b)(6). Thereunder, dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v.*

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[2] *See* Wash. Rev. Code §§ 9.94A.220, 9.92.066, 9.95.240 & 9.96.050.

Gibson, 355 U.S. 41, 45-46 (1957). In analyzing a 12(b)(6) motion, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Western Reserve Oil & Gas Co., v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985). The issue is not whether Plaintiffs will ultimately prevail, but whether they are entitled to offer evidence in support of their claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Under this liberal standard, motions to dismiss are viewed with disfavor. *Intake Water Co. v. Yellowstone River Compact Comm'n.*, 590 F.Supp. 293 (D Mont. 1983), *aff'd*, 769 F.2d 568 (9th Cir. 1985).

2. The Voting Rights Act Claims

Congress enacted the VRA for the broad remedial purpose of "rid[ding] the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). For this reason, the VRA should be interpreted in a manner that provides "the broadest possible scope in combating racial discrimination." *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969). In 1982, Congress amended the VRA in order to relieve plaintiffs of the burden of proving discriminatory intent, after a plurality of the Supreme Court had concluded that the pre-1982 VRA, like the Fifteenth Amendment, contained such a requirement. *See Mobile v. Bolden*, 446 U.S 55 (1980). As amended, § 2 of the VRA now states:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the

> right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) The violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. Subsection (b) has come to be known as the "results test" under the VRA. As explained by the Supreme Court, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality" in the voting rights of various racial groups. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

The VRA has been interpreted to apply two types of discriminatory practices and procedures:

those that result in "vote denial" and those that result in "vote dilution." Plaintiffs' Complaint alleges both.

a. Vote Denial

The Background of Vote Denial Claims and Applications to this Case

Originally, enforcement of the Fifteenth Amendment under the VRA involved challenges of state election practices such, as literacy tests, that resulted in the denial of the right to vote to minority citizens. *See e.g., Oregon v Mitchell*, 400 U.S. 112 (1970). The VRA was enacted in response to the increasing sophistication with which states were denying racial minorities the right to vote. After the Civil War and ratification of the Fifteenth Amendment, several southern states enacted facially neutral voting requirements, which had the effect of sustaining the denial of the right to vote on the basis of race. Congress created the VRA to put an end to the states' "unremitting an ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

In considering Plaintiffs' allegations of vote denial under the VRA, the question arises as to whether Washington's felon disenfranchisement law may be a test or device that denies individuals the right to vote on the basis of race. On its face, the VRA applies to Plaintiffs' claims. Plaintiffs are citizens, and felon disenfranchisement is a voting device. Consequently, if Plaintiffs were to prove that Washington's felon disenfranchisement scheme denies them the right to vote in a discriminatory manner, then it would be a voting device that

violates the VRA. Defendants argue that the meaning of the VRA cannot simply be derived from its face. Instead, voting devices such as felon disenfranchisement laws can only fall under the VRA if Congress has plainly stated such. Otherwise the VRA would constitute an overstatement of Congress's remedial powers under § 2 of the Fourteenth Amendment.

The Plain Statement Rule Does Not Apply to the VRA

Defendants claim that the VRA cannot be read in isolation in order to determine its application. Their argument is largely based on the Second Circuit case of *Baker v. Pataki*, 85 F.3d 919 (2nd Cir. 1996). In *Baker*, an *en banc* panel of the Second Circuit split five-to-five on the question of whether disenfranchised felons could state a claim under the VRA.[3] Led by Judge Mahoney, the five judges favoring dismissal explained that the VRA falls under the "plain statement" rule of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Under this rule, if a congressional enactment would have the effect of altering the usual constitutional balance between the federal government and the states, then Congress's intention regarding the application of a statute must be made "unmistakably clear." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citations omitted). Given Congress's silence on the issue of felon disenfranchisement at the time of the 1982

[3] Because the judges were evenly divided, the decision in *Baker* does not have precedential value. The result was to uphold the decision of the district court, which had dismissed the plaintiffs' claims under Fed. R. Civ. P. 12(b)(6).

amendment to the VRA, Judge Mahoney concluded that no plain statement existed and the VRA could not apply to felon disenfranchisement statutes. *Baker*, 85 F.3d at 922.

The Court does not agree that the plain statement rule applies to the VRA. The Civil War Amendments to the United States Constitution have already changed the usual constitutional balance between the states and the federal government. The remedial clause of the Fourteenth Amendment was specifically created so that the federal government could police states for violations of the constitutional rights of racial minorities. *See Mitchell*, 400 U.S. at 127-28. The Supreme Court has consistently recognized that Congress has the power to enforce the Fourteenth and Fifteenth Amendments through the VRA, "despite the burdens those measures placed on the states." *City of Boerne v. P.F. Flores*, 117 S.Ct. 2157 (1997); *see also South Carolina v. Katzenbach, supra; Katzenbach v. Morgan, supra; Oregon v. Mitchell, supra; City of Rome v. United States*, 446 U.S. 156 (1980). Because these amendments, on which the VRA is based, altered the federal-state balance of power as contemplated by the original constitution, the "plain statement" rule is simply inapplicable in the context of the VRA. *Baker*, 85 F.3d at 938-39. *See also Chisom v. Roemer*, 501 U.S. 380 (1991) (Scalia, J., dissenting) (although dissenting from the majority's application of the VRA's "results test" to the election of state judges, Justice Scalia recognized that the "plain statement" rule should not apply).

The VRA Also Does Not Violate Section Two of the Fourteenth Amendment

Implicit in Defendants' briefing is the argument that should the "plain statement" rule not apply, the "results test" under § 2 of the VRA would be an unconstitutional exercise of Congress's remedial powers. As explained by Justice Black in *Oregon v. Mitchell*,

> [a]s broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation."

400 U.S. at 266-67.

Defendants argue that the VRA cannot apply to felon disenfranchisement, otherwise it would override § 2 of the Fourteenth Amendment. Section 2 of the Fourteenth Amendment provides for the election of federal legislative representatives, and reads as follows:

> Representatives shall be appointed among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives of Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such States, being twenty-one years of age, and citizens of the United States, or in any way abridges, except for participation in rebellion, *or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court explained that the "other crime" language in § 2 provides constitutional recognition of the validity of felon disenfranchisement laws. Consequently, Defendants' argument is that Congress does not have the authority to illegalize felon disenfranchisement.

As explained more fully in Section Four of this order, below, the Court agrees with Defendants that given § 2 of the Fourteenth Amendment, felon disenfranchisement laws cannot constitute *per se* violations of the Constitution. Viewed in isolation, it is constitutionally permissible to strip an individual of the right to vote based upon conviction for a felony. However, in spite of this facial validity, the Supreme

Court has made clear that the states cannot use felon disenfranchisement as a tool to discriminate on the basis of race. *See Hunter v. Underwood*, 471 U.S. 222 (1985) (where original enactment was motivated by racial bias, facially neutral felon disenfranchisement law violates equal protection). It necessarily follows, then, that Congress also has the power to protect against discriminatory uses of felon disenfranchisement statutes through the VRA.

Defendants also argue that if the "results test" of § 2 of the VRA were to be read so broadly as to encompass felon disenfranchisement statutes, then § 2 would cease to be only an enforcement mechanism. Instead, it would constitute an impermissible expansion of constitutional protections. This argument is based on the recent Supreme Court decision in *City of Boerne v. P.F. Flores*, 117 S.Ct. 2157 (1997).

In *Boerne*, the Court held that Congress exceeded its remedial authority under the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993 ("RFRA:"), 42 U.S.C. § 2000bb et seq. Under RFRA, a state law of general applicability that substantially burdened the free exercise of religion, violated federal law unless it could be justified by strict scrutiny analysis. The Supreme Court criticized this test as over-inclusive. The Court explained that the utilization of Congress's remedial power must exhibit, "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 2164. The Court concluded that by prohibiting state laws and policies that merely placed incidental burdens on the exercise of religion,

Congress went beyond its goal of prohibiting discrimination on the basis of religion to create a new substantive right. *Id.* at 2170.

The Supreme Court's decision in *Boerne* provides a recital of the Court's previous decisions approving numerous provisions of the VRA. In this discussion, the Court concluded that the VRA was narrowly tailored in comparison to RFRA. In so doing, the Court noted that the VRA, as previously approved, applied to specific geographic areas and subject matter that Congress found to be tainted by racial discrimination. *Id.* at 2170-71. Based on this discussion, one might wonder whether the Court's approval of the VRA is limited to areas where Congress has specifically found the presence of discrimination and need for intervention. If approval of the VRA were so limited, then § 2 of the VRA would not be able to reach subject matter, such as felon disenfranchisement laws, that have not been found by Congress to be perpetuated with discriminatory intent. As explained below, the Court rejects this interpretation on the basis that the VRA is sufficiently distinguishable from RFRA, even when not accompanied by specific congressional findings.

As a preliminary matter, the appropriate means-end balance is different in the context of race than religion. Although this country's history has not been free of invidious treatment of individuals on the basis of religion, discrimination on the basis of race is a far deeper problem that has been recurrent throughout our history. The remedies Congress created to address racial discrimination through the VRA were "unprecedented" and "deemed necessary

given the ineffectiveness of the existing voting rights laws." *Boerne*, 117 S.Ct. at 2167.

A further distinction between § 2 of the VRA and RFRA is that the "results test" is tailored to fit the end goal of preventing discriminatory voting practices. Section 2 does not prohibit every voting test or restriction that effects racial minorities more than whites. If it did, then its breadth would be suspect, even given the extent of Congress's power in eliminating racial discrimination in voting. But instead, in order to satisfy the requirement of § 2, a plaintiff "must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result." *Smith v. Salt River Proj. Ag. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). Read as such, the "results test" is properly limited to capturing racial discrimination when proof of intent is not accessible.

Application of the VRA to Plaintiffs' Complaint

Having determined that the VRA can apply to felon disenfranchisement laws, the question becomes whether Plaintiffs have alleged facts sufficient to state a claim for vote denial under the VRA. Section 2(b) of the VRA explains that the determination of whether a voting practice results in discriminatory treatment is to be "based on the totality of the circumstances." 42 U.S.C. § 1973(b).[4] The Senate Judiciary Committee Report, which accompanied the

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[4] *Smith* makes clear that the totality of the circumstances approach applies to both vote denial and vote dilution claims. *Smith*, 109 F.3d at 596 n.8.

1982 Amendments to the VRA, articulated several non-exclusive factors that may be taken into account:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; the extent to which members of the

> minority group have been elected to public office in the jurisdiction;
>
> Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> [7] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> [8] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. (vol. 2) 177, 206-07. The Senate Report factors are mostly limited in relevance to claims for vote dilution, which is discussed below. *See Thornburg*, 478 U.S. at 45.

In determining whether Plaintiffs have alleged circumstances that could prove a causal relationship between Washington's felon disenfranchisement law and the denial of votes to racial minorities, precedent provides little guidance as to which factors should be considered salient. Consequently, the Court's assessment of Plaintiffs' complaint is focused on any circumstances alleged by Plaintiffs that would tend to establish that Washington's felon disenfranchisement law operates with social and historical conditions such that it causes individuals to be denied access to voting privileges on the basis of race.

On review of Plaintiffs' complaint, the Court concludes that Plaintiffs have alleged sufficient facts to state a claim for vote denial under the VRA. Among other things, Plaintiffs allege that African, Hispanic and Native Americans are targeted for prosecution of serious crimes and that they are over-represented in prison populations. If true, Plaintiffs allegations may establish a causal connection between Washington's disenfranchisement scheme and the denial of voting rights to racial minorities.

Plaintiffs' Complaint Should Not Be Dismissed Under *Wesley v. Collins*

The Court does not agree with Defendants that Plaintiffs are prohibited from stating a claim under the VRA because of policy considerations favoring disenfranchisement or the fact that Plaintiffs' own illegal behavior has played a role in their disenfranchisement. Defendants' argument in this context is based on the Sixth Circuit decision in *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986). Addressing a challenge to Tennessee's felon disenfranchisement law under the VRA, the panel in *Wesley* held that, while the plaintiffs had asserted various factors relevant to the totality of the circumstances review, the district court nevertheless correctly dismissed the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(6). The judges in *Wesley* determined that the "chief," and therefore determinative, factor to consider in the case at hand is the important social goal justifying the disenfranchisement of felons. *Id.* at 1261. The rationale for felon disenfranchisement is based

upon John Locke's social contract theory. According to Locke's theory, as interpreted by the Second Circuit in *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir. 1967), those individuals who do not abide by society's rules cannot participate in their promulgation. By disenfranchising felons, states are thought to protect the sanctity of the ballot box, and therefore ensure the continued viability of the democratic process. The *Wesley* panel also noted that Tennessee's disenfranchisement law does not "deny any citizen, *ab initio*, the equal opportunity to participate in the political process . . . . Rather, only the commission of a preascertained, proscribed act warrants the state of Tennessee to foreclose a certain individual from the voting process." *Wesley*, 791 F.2d at 1262.

The Sixth Circuit's reasoning regarding the importance of the rationale behind felon disenfranchisement laws is not binding authority. Moreover, the decision conflicts with Ninth Circuit precedent. In *Dillenburg v. Kramer*, 469 F.2d 1222 (1972), the Ninth Circuit addressed the facial constitutionality of Washington's felon disenfranchisement law. *Dillenburg* did not discuss the racial implications of disenfranchisement statutes, and it predated the Supreme Court's decision in *Richardson*, which held that felon disenfranchisement laws are not *per se* unconstitutional. Thus, *Dillenburg* is not good law to the extent that it suggests that the disenfranchisement of felons, on its face, cannot pass constitutional muster. *Dillenburg* remains applicable, however, to the extent that the decision discusses the alleged justifications for felon disenfranchisement statutes. The panel in

Dillenburg criticized the Locke's "purity of the ballot box" argument as overly academic and empirically unfounded. *Id.* at 1224-25. The decision also criticized Washington's law in particular, since it denies felons the right to vote based on the *possible* penalty for their offense, rather than their *actual* penalty or conduct.[5] On the basis of *Dillenburg*, therefore, consideration of Washington's interest in disenfranchising felons is not conclusive as to whether the totality of the circumstances standard can be met.

The Court also does not agree with the judges in *Wesley* that Plaintiffs' misconduct prohibits them from claiming that Washington's felon disenfranchisement scheme operates so as to discriminate in the allocation of votes on the basis of race. This was not a bar to the plaintiffs claims in *Hunter v. Underwood*, and should play no different role in the case at hand. Implicit in Plaintiffs' Complaint is the argument that, had Plaintiffs Farrakhan, Shaheed, Price, Barrientes, Schaaf, and Briceno been white, they would have been substantially less likely to have lost the right to vote. Consequently, their claim is that race plays an impermissible role in the application of Washington's disenfranchisement scheme. The VRA provides Plaintiffs an avenue for relief from this type of discrimination.

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[5] Although the Washington statute defining infamous crimes has been amended since *Dillenburg*, it does not differ in this respect. *See* Wash. Rev. Code § 29.01.080.

b. Vote Dilution

A separate matter from whether Plaintiffs can state a claim for vote denial is whether Plaintiffs have alleged sufficient facts to support a claim for vote dilution. Although the concept of vote dilution post-dates that of vote denial, vote dilution cases have, in recent years, become the most common manner in which § 2 claims are raised. Vote dilution occurs when an election practice results in the dilution of minority voting strength. *See e.g., Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). It "may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. at 46 n.11. Plaintiff Maxey[6] argues that because Washington's felon disenfranchisement law disproportionately removes racial minorities from the voting population, his voting strength, as a member of the African American community, is diluted.

A claim for vote dilution, like a claim for vote denial, cannot be sustained solely upon an allegation of disparate impact. *See Smith*, 109 F.3d at 595. As explained above, the VRA requires plaintiffs to show a causal relationship between the challenged voting procedure and the discriminatory effect, based upon the totality of the circumstances. The eight Senate factors are especially relevant in the context of vote dilution claims. Three factors, in particular, have been identified by the Supreme Court as necessary in

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[6] Plaintiff Farrakhan, Shaheed, Price, Barrientes, Schaaf, and Briceno do not have standing to assert that their votes have been diluted since they are not registered to vote.

order to succeed on a claim of vote dilution. In *Thornburg*, Justice Brennan wrote that the following factors must be proven in order to establish vote dilution under the VRA: (1) the minority group in question must be sufficiently large and geographically compact to constitute a majority in a voting district;[7] (2) the group must be politically cohesive; and (3) the white majority group must vote sufficiently as a bloc so as to enable it to usually defeat the minority group's preferred candidate. 478 U,S. at 50-51.

Plaintiffs' Complaint and memorandum make conclusory statements about the existence of these factors, but nowhere do they allege any facts of, for instance, voter cohesiveness. Consequently, the Court agrees with Defendants that Plaintiffs have failed to state a claim under the VRA for vote dilution.

3. Claims Under the Fourteenth and Fifteenth Amendments

The Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974) made clear that felon disenfranchisement statutes were contemplated by the Fourteenth Amendment to the United States Constitution and, therefore, do not constitute *per se* violations of the constitutional right to vote. Plaintiffs nevertheless claim that Washington's law is in violation of provisions of the federal Constitution because it was enacted with discriminatory intent. This type of claim is

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[7] This factor may not be necessary where the disputed electoral practice is the product of intentional discrimination. *See Garza v. County of Los Angeles*, 918 F.2d 763, 770 (9th Cir. 1990).

permissible under the reasoning in *Hunter v. Underwood, supra.*

In order to establish that Washington's felon disenfranchisement scheme violates the Fourteenth or Fifteenth Amendments, Plaintiffs must eventually prove that discrimination was a motivating factor in the enactment of the facially neutral law. *See Village of Arlington Heights v. Metropolitan Hous. Auth.*, 429 U.S. 252, 265 (1977). Although Plaintiffs' Complaint alleges improper motive, neither the Complaint nor the Court's own research reveal any circumstantial or direct evidence that would tend to support this claim. Consequently, Plaintiffs have also failed to adequately state a claim in this regard. *See Wesley*, 791 F.2d at 1262-63 (upholding lower court's dismissal of equal protection challenge to Tennessee disenfranchisement statute for failure to state a claim in light of plaintiffs' inability to present evidence that "proved or inferred a discriminatory intent" on the part of the Tennessee legislature and stating that "the further discovery requested by plaintiffs would be in the nature of a fishing expedition for unspecified evidence.")

4. The Remaining Constitutional Claims

Plaintiffs also claim that Washington's felon disenfranchisement law violates free speech, double jeopardy and the prohibition of cruel and unusual punishment under the First, Fifth, and Eighth Amendments to the Constitution. In order to uphold these claims against Defendants' motion to dismiss, the Court would have to conclude that the same Constitution that recognizes felon disenfranchisement under § 2 of the Fourteenth

Amendment also prohibits disenfranchisement under other amendments. The Court is not inclined to interpret the Constitution in this internally inconsistent manner or to determine that the Supreme Court's declaration of the facial validity of felon disenfranchisement laws in *Richardson v. Ramirez* was based only on the fortuity that the plaintiffs therein did not make their arguments under different sections of the Constitution. While discussing the precedent leading up to its decision in *Richardson*, the Court wrote that "recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision." *Richardson*, 418 U.S. at 53. This language in *Richardson* suggests that the facial validity of felon disenfranchisement may be absolute. The Court concurs with this application to the case at hand.

The introduction to Plaintiffs' response memorandum states that **"[t]his case is about race."** Plaintiffs Responsive Memorandum of Authorities in Opposition to Defendant's Motion to Dismiss (Ct. Rec. 72) (emphasis in original). The Court agrees. Consequently, Plaintiffs can only state a claim for relief based on the invalidity of Washington's felon disenfranchisement scheme to the extent that the law discriminates on the basis of race.

5. Plaintiffs' Motion to Amend

Plaintiffs have moved to amend their Complaint to include Bevan Maxey as a Plaintiff, and to allege a new cause of action to be stated by Plaintiff Farrakhan claiming that Washington's

statute governing the restoration of felons' civil rights, Wash. Rev. Code 9.94A.220, fails to comport with the requirements of due process. Defendants object to Plaintiff Farrakhan's new claim based upon lack of standing.

According to Defendants, Plaintiff Farrakhan has yet to complete the terms of his sentence, *See* Affidavit of Phil Reynolds, attached as Exhibit One to Defendants' Reply Memorandum (Ct. Rec. 78). Consequently, he is ineligible to apply for restoration of his civil rights and cannot attack the constitutionality of the restoration process. At oral argument, Plaintiffs contested that material issues of fact exist as to whether Plaintiff Farrakhan has completed his sentence. However, Plaintiffs have not come forward with any evidence that places Defendants' claim into doubt.

Although the Court must view a motion to amend with extreme liberality, amendment is not proper if it would be futile. *See Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994). The Court concludes, from the record at hand, that Plaintiffs' motion to amend, as to the substantive due process claim, cannot be granted on the basis of lack of standing.[8] Because Plaintiff Farrakhan is not yet eligible to seek reinstatement of his voting rights, his alleged injury is too speculative to support a cause of action challenging the constitutionality of the reinstatement provisions. *See, e.g., Texas Supporters of Workers World Party Presidential Candidates v. Strake*, 511 F.Supp. 149 (S.D. Tex. 1981) (plaintiff

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[8] If Plaintiff Farrakhan does hold evidence which puts the status of his sentence into doubt, he may include this information in a motion for reconsideration.

ex-felons did not have standing to assert cause of action based on denial of pardons where they had not formally applied for pardons). Consequently, Plaintiffs' Motion to Amend is denied, except to the extent that Bevan Maxey shall be added as a party of record, albeit to a dismissed claim, for the purposes of appeal.

Based upon the foregoing analysis, **IT IS HEREBY ORDERED:**

1. Defendants' Motion to Dismiss (**Ct. Rec. 53**) is **GRANTED in part and DENIED in part**. Defendants' motion is denied as to Plaintiffs' vote denial claim. Plaintiffs' vote dilution claim and all of Plaintiffs' constitutional claims are dismissed. The parties are instructed to note that only Farrakhan, Shaheed, Price, Barrientes, Schaaf, and Briceno remain as plaintiffs in this action.

2. Plaintiffs' Motion for Leave to Amend (**Ct. Rec. 66**) is **GRANTED in part and DENIED in part**. Plaintiffs' motion to add Bevan Maxey is granted, *nunc pro tunc*, for the purposes of appeal. Plaintiffs' motion to add a due process claim is denied.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 13 day of November, 1997.

/s/
ROBERT H. WHALEY
United States District Judge

Constitution of the United States
Fourteenth Amendment Sections 2 and 5

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Constitution of The United States
Fifteenth Amendment
Universal Male Suffrage

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1973
Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Washington Constitution
Article VI. Who Disqualified

§3 All persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise.

Washington Constitution
Article III. Qualifications, Compensation, Offices Which May Be Abolished

§25 No person, except a citizen of the United States and a qualified elector of this state, shall be eligible to hold any state office. The compensation for state officers shall not be increased or diminished during the term for which they shall have been elected. The legislature may in its discretion abolish the offices of the lieutenant governor, auditor and commissioner of public lands.

Washington Constitution
Article II

§7 Qualifications of Legislators.

No person shall be eligible to the legislature who shall not be a citizen of the United States and a qualified voter in the district for which he is chosen.

Wash. Rev. Code § 2.36.070
Qualification of juror.

A person shall be competent to serve as a juror in the state of Washington unless that person:

(1) Is less than eighteen years of age;

(2) Is not a citizen of the United States;

(3) Is not a resident of the county in which he or she has been summoned to serve;

(4) Is not able to communicate in the English language; or

(5) Has been convicted of a felony and has not had his or her civil rights restored.

Wash. Rev. Code § 9.94A.637
Discharge upon completion of sentence – Certificate of discharge – Obligations, counseling after discharge.

(1)(a) When an offender has completed all requirements of the sentence, including any and all legal financial obligations, and while under the custody and supervision of the department, the secretary or the secretary's designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender in person or by mailing the certificate to the offender's last known address.

(b)(i) When an offender has reached the end of his or her supervision with the department and has completed all the requirements of the sentence

except his or her legal financial obligations, the secretary's designee shall provide the county clerk with a notice that the offender has completed all nonfinancial requirements of the sentence.

(ii) When the department has provided the county clerk with notice that an offender has completed all the requirements of the sentence and the offender subsequently satisfies all legal financial obligations under the sentence, the county clerk shall notify the sentencing court, including the notice from the department, which shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender in person or by mailing the certificate to the offender's last known address.

(2) The court shall send a copy of every signed certificate of discharge to the auditor for the county in which the court resides and to the department. The department shall create and maintain a data base containing the names of all felons who have been issued certificates of discharge, the date of discharge, and the date of conviction and offense.

(3) An offender who is not convicted of a violent offense or a sex offense and is sentenced to a term involving community supervision may be considered for a discharge of sentence by the sentencing court prior to the completion of community supervision, provided that the offender has completed at least one-half of the term of community supervision and has met all other sentence requirements.

(4) Except as provided in subsection (5) of this section, the discharge shall have the effect of restoring all civil rights lost by operation of law upon

conviction, and the certificate of discharge shall so state. Nothing in this section prohibits the use of an offender's prior record for purposes of determining sentences for later offenses as provided in this chapter. Nothing in this section affects or prevents use of the offender's prior conviction in a later criminal prosecution either as an element of an offense or for impeachment purposes. A certificate of discharge is not based on a finding of rehabilitation.

(5) Unless otherwise ordered by the sentencing court, a certificate of discharge shall not terminate the offender's obligation to comply with an order issued under chapter 10.99 RCW that excludes or prohibits the offender from having contact with a specified person or coming within a set distance of any specified location that was contained in the judgment and sentence. An offender who violates such an order after a certificate of discharge has been issued shall be subject to prosecution according to the chapter under which the order was originally issued.

(6) Upon release from custody, the offender may apply to the department for counseling and help in adjusting to the community. This voluntary help may be provided for up to one year following the release from custody.

Wash. Rev. Code § 9.94A.190
Terms of more than one year or less than one year – Where served – Reimbursement of costs.

(1) A sentence that includes a term or terms of confinement totaling more than one year shall be served in a facility or institution operated, or utilized

under contract, by the state. Except as provided in subsection (3) or (5) of this section, a sentence of not more than one year of confinement shall be served in a facility operated, licensed, or utilized under contract, by the county, or if home detention or work crew has been ordered by the court, in the residence of either the offender or a member of the offender's immediate family.

Wash Rev. Code § 9.96.010
Restoration of Civil Rights

Whenever the governor shall grant a pardon to a person convicted of an infamous crime, or whenever the maximum term of imprisonment for which any such person was committed is about to expire or has expired, and such person has not otherwise had his civil rights restored, the governor shall have the power, in his discretion, to restore to such person his civil rights in the manner as in this chapter provided.

Wash. Rev. Code § 9.96.050
Final discharge of parolee – Restoration of civil rights – Governor's pardoning power not affected.

When a prisoner on parole has performed all obligations of his or her release, including any and all legal financial obligations, for such time as shall satisfy the indeterminate sentence review board that his or her final release is not incompatible with the best interests of society and the welfare of the paroled individual, the board may make a final order of discharge and issue a certificate of discharge to the prisoner. The certificate of discharge shall be

issued to the offender in person or by mail to the prisoner's last known address.

The board shall send a copy of every signed certificate of discharge to the auditor for the county in which the offender was sentenced and to the department of corrections. The department shall create and maintain a data base containing the names of all felons who have been issued certificates of discharge, the date of discharge, and the date of conviction and offense.

The board retains the jurisdiction to issue a certificate of discharge after the expiration of the prisoner's or parolee's maximum statutory sentence. If not earlier granted, the board shall make a final order of discharge three years from the date of parole unless the parolee is on suspended or revoked status at the expiration of the three years. Such discharge, regardless of when issued, shall have the effect of restoring all civil rights lost by operation of law upon conviction, and the certification of discharge shall so state. This restoration of civil rights shall not restore the right to receive, possess, own, or transport firearms.

The discharge provided for in this section shall be considered as a part of the sentence of the convicted person and shall not in any manner be construed as affecting the powers of the governor to pardon any such person.

Wash. Rev. Code § 10.64.021
Notice of Conviction

Within fourteen days of the entry of a judgment of conviction of an individual for a felony, the clerk of the court shall send a notice of the conviction including the full name of the defendant and his or her residential address to the county auditor or custodian of voting records in the county of the defendant's residence.

Wash. Rev. Code § 29A.04.079
Infamous crime.

An "infamous crime" is a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility.

Wash. Rev. Code § 29A.08.520
Cancellation for conviction of felony.

Upon receiving official notice of a person's conviction of a felony in either state or federal court, if the convicted person is a registered voter in the county, the county auditor shall cancel the defendant's voter registration.

Wash. Rev. Code § 42.04.020
Eligibility to hold office.

That no person shall be competent to qualify for or hold any elective public office within the state of Washington, or any county, district, precinct, school district, municipal corporation or other district or political subdivision, unless he be a citizen of the United States and state of Washington and an

elector of such county, district, precinct, school district, municipality or other district or political subdivision.

Alabama Constitution
Sec. 182. Certain persons disqualified from registering and voting.

The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

Ala. Code
§ 17-3-10. Restoration of right to vote upon pardon.

Any person who is disqualified by reason of conviction of any of the offenses mentioned in Article VIII of the Constitution of Alabama, except treason and impeachment, whether the conviction was had in a state or federal court, and who has been pardoned, may be restored to his citizenship with right to vote by the State Board of Pardons and Paroles when specifically expressed in the pardon. If otherwise qualified, such person shall be permitted to register or reregister as an elector upon submission of a copy of the pardon document to the board of registrars or deputy registrars of the county of his residence.

Alaska Constitution
Article V. Suffrage and Elections

§2 No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored. No person may vote who has been judicially determined to be of unsound mind unless the disability has been removed.

Alaska Admin. Code
Title 15. Elections.

§ 15.60.010(7) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a

false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, promoting prostitution, criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

Arizona Constitution
Article VII. Suffrage And Elections
§ 2

A. No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for the period of time preceding such election as prescribed by law, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word "citizen" shall include persons of the male and female sex.

B. The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike.

C. No person who is adjudicated an incapacitated person shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

Ariz. Rev. Stat. Ann.
§ 16-101(A)(5)
Qualifications of Registrant; Definition

A. Every resident of the state is qualified to register to vote if he:

5. Has not been convicted of treason or a felony, unless restored to civil rights.

Arkansas Constitution
Amend. 51. Voter Registration Without Poll Tax Payment
§ 11(a)(4). Cancellation of Registration

(a) It shall be the duty of the permanent registrar to cancel the registration of voters:

(4) Who have been convicted of felonies and have not discharged their sentence or been pardoned;

California Constitution
Article II. Voting, Initiative and Referendum and Recall
§ 4. Improper practices; certain persons as electors; prohibition

Sec. 4. The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony.

Cal. Elec. Code
§ 2101. Entitlement; prerequisites

A person entitled to register to vote shall be a United States citizen, a resident of California, not in prison or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election.

Colorado Constitution
Article VII. Suffrage and Elections
§ 1. Qualifications of elector

Every citizen of the United States who has attained the age of eighteen years, has resided in this state not less than one year next preceding the election at which he offers to vote and in the county, city, town, ward, or precinct such time as may be prescribed by law, and has been duly registered as a voter if required by law shall be qualified to vote at all elections; except that the general assembly may by law extend to citizens of the United States who have resided in this state less than one year the right to vote for presidential and vice-presidential electors.

Colo. Rev. Stat. Ann.
§ 1-2-103. Military service–students–inmates–mentally ill persons

(1) For the purposes of registration, voting, and eligibility for office, no person shall gain residence by reason of that person's presence, or lose it by reason of absence, while in the civil or military service of the state or of the United States; nor while a student at any institution of higher education; nor while confined in a correctional facility, jail, or state institution.

(2) The provisions of subsection (1) of this section notwithstanding, no person otherwise qualified under the provisions of this code shall be denied the right to register or to vote at any election held within this state solely because that person is a student at an institution of higher education.

(3) No provision in this section shall apply in the determination of residence or residence status of students for any college or university purpose.

(4) No person while serving a sentence of detention or confinement in a correctional facility, jail, or other location or while serving a sentence of parole shall be eligible to register to vote or to vote in any election; however, a confined prisoner who is awaiting trial but has not been tried shall be certified by the institutional administrator and shall be permitted to register to vote by mail registration pursuant to part 5 of this article.

(5) No person confined in a state institution for the mentally ill shall lose the right to vote because of the

confinement.

Conn. Gen. Stat.
§ 9-46. Forfeiture of electoral rights

(a) A person shall forfeit such person's right to become an elector and such person's privileges as an elector upon conviction of a felony and committal to the custody of the Commissioner of Correction for confinement in a correctional institution or facility or a community residence, committal to confinement in a federal correctional institution or facility, or committal to the custody of the chief correctional official of any other state or a county of any other state for confinement in a correctional institution or facility or a community residence in such state or county.

(b) No person who has forfeited and not regained such person's privileges as an elector, as provided in section 9-46a, may be a candidate for or hold public office.

Delaware Constitution
Article V. Elections

§2 Every citizen of this State of the age of twenty-one years who shall have been a resident thereof one year next preceding an election, and for the last three months a resident of the county, and for the last thirty days a resident of the hundred or election district in which he or she may offer to vote, and in which he or she shall have been duly registered as hereinafter provided for, shall be entitled to vote at such election in the hundred or election district of which he or she shall at the time be a resident, and

in which he or she shall be registered, for all officers that now are or hereafter may be elected by the people and upon all questions which may be submitted to the vote of the people; provided, however, that no person who shall attain the age of twenty-one years after the first day of January in the year of our Lord, nineteen hundred, or after that date shall become a citizen of the United States, shall have the right to vote unless he or she shall be able to read this Constitution in the English language and write his or her name; but these requirements shall not apply to any person who by reason of physical disability shall be unable to comply therewith; and provided also, that no person in the military, naval, or marine service of the United States shall be considered as acquiring a residence in this State, by being stationed in any garrison, barrack, or military or naval place or station within this State; and no person adjudged mentally incompetent or person convicted of a crime deemed by law felony, or incapacitated under the provisions of this Constitution from voting, shall enjoy the right of an elector; and the General Assembly may impose the forfeiture of the right of suffrage as a punishment for crime. Any person who is disqualified as a voter because of a conviction of a crime deemed by law a felony shall have such disqualification removed upon being pardoned, or five years after the expiration of the sentence, whichever may first occur. The term "sentence" as used in this Section shall include all periods of modification of a sentence, such as, but not limited to, probation, parole and suspension. The provision of this paragraph shall not apply to (1) those persons who were convicted of any felony of murder or manslaughter, (except vehicular homicide); or (2)

those persons who were convicted of any felony constituting an offense against public administration involving bribery or improper influence or abuse of office, or any like offense under the laws of any state or local jurisdiction, or of the United States, or of the District of Columbia; or (3) those persons who were convicted of any felony constituting a sexual offense, or any like offense under the laws of any state or local jurisdiction or of the United States or of the District of Columbia.

Del. Code Ann.
Title 15. Elections
§ 6101 Statement of purpose.

The Constitution of the State provides that certain persons who previously lost voting rights because of a felony conviction shall be permitted to vote. It is the purpose of this chapter to provide a procedure whereby such persons may register to vote.

Del. Code Ann.
Title 15. Elections
§ 6102 Definitions.

(a) The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them except where the context clearly indicates a different meaning:

(1) "Commissioner of Elections" shall mean the State Election Commissioner or the Commissioner's designee.

(2) "Disqualifying felony" shall mean that type of felony set forth in § 2,

Article V of the Constitution of this State which permanently disqualifies any person convicted of such felony from voting.

(3) "Financial obligations" includes such fees, fines, costs and restitution which a felony offender may be required to pay as part of the criminal sanctions imposed upon such offender.

(4) "Full discharge" or "fully discharged" shall mean that a person convicted of a criminal offense has served the required sentence of imprisonment, parole, work release, early release, supervised custody, probation and community supervision, and has also paid all financial obligations required by the sentence.

(b) For the purposes of § 2 of Article V of the Constitution of this State and for the purposes of this chapter, no sentence shall be deemed to be expired until a person convicted of a criminal offense has served the required sentence of imprisonment, parole, work release, early release, or supervised custody and community supervision and has also paid all financial obligations and restitution required by the sentence.

Del. Code Ann.
Title 15. Elections
§ 6103 Application for registration: felony conviction reviews.

(a) The county department of elections shall not register any applicant as a qualified voter until it has been determined that such applicant is lawfully

eligible to vote. The county department shall, for each registration application, perform an electronic inquiry against the Criminal Justice Information System (CJIS) and other data to determine if the applicant has been convicted of a felony. If the applicant has not been convicted of a felony and is otherwise eligible to register to vote pursuant to the Delaware Constitution and this title, the applicant shall be registered.

(b) If a review by the county department of elections shows that the applicant has been convicted of a disqualifying felony, the registration application shall be denied and the applicant shall not be permitted to register.

(c) If the applicant has been convicted of a felony which is not disqualifying but the felony conviction occurred within 5 years preceding the date of the application, then the registration application shall be denied.

(d) If the results of the (CJIS) inquiry cannot determine the eligibility of the applicant, the respective county department of elections shall forward the application to the Commissioner of Elections.

Del. Code Ann.
Title 15. Elections
§ 6104 Commissioner's review of application.

(a) If the applicant has not been convicted of a felony within the 5 years preceding the date of the application, the Commissioner of Elections shall request that both the Office of State Court

Collections Enforcement (OSCCE) and the Department of Correction separately conduct a review and data search of all records relating to the applicant.

(b) Upon request by the Commissioner of Elections, the OSCCE shall review its records to determine if the applicant has paid all financial obligations assessed against such applicant. Upon request by the Commissioner of Elections, the Department of Correction shall review its records to determine if all sentences of imprisonment and community supervision imposed upon the applicant have been fully discharged.

(c) Where it has been determined that the applicant was convicted of a felony which is not disqualifying, has fully discharged all imposed sentences, and otherwise meets all constitutional requirements, the applicant shall be permitted to register as a qualified voter. Each stage of the review process shall be completed within a reasonable time.

(d) Where the Commissioner of Elections determines from information received from OSCCE or from the Department of Correction that there are financial obligations which have not been paid; or that not all sentences have been fully discharged; or that other questions or issues relating to the applicant's eligibility are still unresolved, the Commissioner shall deny the application for registration. Upon denial of an application under this section, the applicant shall be notified by mail.

Del. Code Ann.
Title 15. Elections
§ 6105 Cooperation between agencies; waiver of fees.

Notwithstanding any statute or other provision to the contrary, in any request for information or any act by the Commissioner of Elections under this chapter, fees which would otherwise be assessed for criminal background or other computer searches shall be waived. Each state agency and public subdivision of this State shall cooperate with and assist the Commissioner of Elections in the performance of the Commissioner's duties in implementing the provisions of this chapter, including but not limited to fingerprinting, background investigations and record reviews.

Del. Code Ann.
Title 15. Elections
§ 6106 Rules and regulations.

The Commissioner of Elections shall promulgate rules and regulations when information regarding an applicant is incomplete or uncertain. These guidelines and standards shall be used to determine whether or not the applicant shall be permitted to register to vote.

Del. Code Ann.
Title 15. Elections
§ 6107 Appeals.

Any decision by the Commissioner of Elections may be appealed to the Superior Court. No person whose registration application has been denied by the

Commissioner of Elections shall be permitted to register or to vote until the Commissioner of Elections or the Court, in writing, approves such person's registration application.

District of Columbia Constitution
Article V. Suffrage
Section 1. Voting Eligibility.

Every citizen of the United States is eligible to vote in any election and to circulate and sign nominating, initiative, referendum, recall, and other petitions authorized by law, provided that the person

(a) resides or is domiciled in the State or the National Capital Service Area as defined in this Constitution and does not claim voting residence or the right to vote in any other state, territory, or country;

(b) will be at least 18 years old on the date of the election;

(c) is not mentally incompetent as determined by a court of competent jurisdiction;

(d) is not incarcerated in a correctional institution as a result of conviction in the United States of a crime which would be a felony in the State; and

(e) has registered to vote at the time of the election or by the time the petitions are filed.

An eligible person may register at any time except that the House of Delegates may prescribe a period of delay of up to 30 days between the date on which a

person registers and the date on which that person becomes eligible to vote.

Florida Constitution
Article VI. Suffrage and Elections
§ 4. Disqualifications

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

Fla. Stat. Ann.
Title IX. Electors and Elections
Part II. Florida Voter Registration Act
§ 97.041. Qualifications to register or vote

(1)(a) A person may become a registered voter only if that person:

1. Is at least 18 years of age;

2. Is a citizen of the United States;

3. Is a legal resident of the State of Florida;

4. Is a legal resident of the county in which that person seeks to be registered; and

5. Registers pursuant to the Florida Election Code.

(b) A person who is otherwise qualified may preregister on or after that person's 17th birthday and may vote in any election occurring on or after that person's 18th birthday.

(2) The following persons, who might be otherwise qualified, are not entitled to register or vote:

(a) A person who has been adjudicated mentally incapacitated with respect to voting in this or any other state and who has not had his or her right to vote restored pursuant to law.

(b) A person who has been convicted of any felony by any court of record and who has not had his or her right to vote restored pursuant to law.

(3) A person who is not registered may not vote.

Georgia Constitution
Article II. Voting and Elections
Section I. Method of voting; right to register and vote

¶3 (a) No person who has been convicted of a felony involving moral turpitude may register, remain registered, or vote except upon completion of the sentence.

Ga. Code Ann.
Title 21. Elections
§ 21-2-216(b). Elector's qualifications; applicants acquiring age qualifications within six months permitted to register; electors not required to reregister; electors moving to another state

(b) In addition to the qualifications in subsection (a) of this Code section, no person who has been convicted of a felony involving moral turpitude may register, remain registered, or vote except upon

completion of the sentence and no person who has been judicially determined to be mentally incompetent may register, remain registered, or vote unless the disability has been removed.

Hawaii Constitution
Article II. Suffrage and Elections
Section 2

No person who is non compos mentis shall be qualified to vote. No person convicted of a felony shall be qualified to vote except upon the person's final discharge or earlier as provided by law.

Haw. Rev. Stat.
Chapter 831. Uniform Act on Status of Convicted Persons
§ 831-2. Rights lost.

(a) A person sentenced for a felony, from the time of the person's sentence until the person's final discharge, may not:

(1) Vote in an election, but if execution of sentence is suspended with or without the defendant being placed on probation or the defendant is paroled after commitment to imprisonment, the defendant may vote during the period of the suspension or parole; or

(2) Become a candidate for or hold public office.

(b) A public office held at the time of conviction is forfeited as of the date of the conviction, if the conviction is in this State, or, if the conviction is in another state or in a federal court, as of the date a

certification of the conviction from the trial court is filed in the office of the lieutenant governor who shall receive and file it as a public document. An appeal or other proceeding taken to set aside or otherwise nullify the conviction or sentence does not affect the application of this section.

For purposes of this section:

"Public office" means an office held by an elected official, department heads, officers, and members of any board, commission, or other state agency whose appointments are made by the governor, chief justice, office of Hawaiian affairs, or the judicial selection commission, or are required by law to be confirmed by the senate.

"Time of conviction" means the day upon which the person was found guilty of the charges by the trier of fact or determined to be guilty by the court.

(c) Subsections (a) and (b) of this section and any other laws to the contrary notwithstanding, any person convicted of any act, attempt, or conspiracy to overthrow the state or the federal government by force or violence shall not hold any public office or employment.

Idaho Constitution
Article VI. Suffrage and Elections
§ 3 Disqualification of certain persons.

No person is permitted to vote, serve as a juror, or hold any civil office who has, at any place, been convicted of a felony, and who has not been restored to the rights of citizenship, or who, at the time of

such election, is confined in prison on conviction of a criminal offense.

Idaho Code
Title 18. Crimes and Punishments
§18-310. Imprisonment – Effect on civil rights and offices.

(1) A sentence of custody to the Idaho state board of correction suspends all the civil rights of the person so sentenced including the right to refuse treatment authorized by the sentencing court, and forfeits all public offices and all private trusts, authority or power during such imprisonment: provided that any such person may bring an action for damages or other relief in the courts of this state or have an action brought against such person; and provided further that any such person may lawfully exercise all civil rights that are not political during any period of parole or probation, except the right to ship, transport, possess or receive a firearm, and the right to refuse treatment authorized by the sentencing court.

(2) Upon final discharge, a person convicted of any Idaho felony shall be restored the full rights of citizenship, except that for persons convicted of treason or those offenses enumerated in paragraphs (a) through (jj) of this subsection the right to ship, transport, possess or receive a firearm shall not be restored. As used in this subsection, "final discharge" means satisfactory completion of imprisonment, probation and parole as the case may be.

(a) aggravated assault (18-905, 18-915, Idaho Code);

(b) aggravated battery (18-907, 18-915, Idaho Code);
(c) assault with intent to commit a serious felony (18-909, 18-915, Idaho Code);
(d) battery with intent to commit a serious felony (18-911, 18-915, Idaho Code);
(e) burglary (18-1401, Idaho Code);
(f) crime against nature (18-6605, Idaho Code);
(g) domestic battery, felony (18-918, Idaho Code);
(h) enticing of children, felony (18-1509, Idaho Code);
(i) forcible sexual penetration by use of a foreign object (18-6608, Idaho Code);
(j) indecent exposure, felony (18-4116, Idaho Code);
(k) injury to child, felony (18-1501, Idaho Code);
(l) intimidating a witness, felony (18-2604, Idaho Code);
(m) lewd conduct with a minor or child under sixteen (18-1508, Idaho Code);
(n) sexual abuse of a child under sixteen (18-1506, Idaho Code);
(o) sexual exploitation of a child (18-1507, Idaho Code);
(p) felonious rescuing prisoners (18-2501, Idaho Code);
(q) escape by one charged with, convicted of or on probation for a felony (18- 2505, Idaho Code);
(r) unlawful possession of a firearm (18-3316, Idaho Code);
(s) degrees of murder (18-4003, Idaho Code);
(t) voluntary manslaughter (18-4006(1), Idaho Code);
(u) assault with intent to murder (18-4015, Idaho Code);
(v) administering poison with intent to kill (18-

4014, Idaho Code);
(w) kidnapping (18-4501, Idaho Code);
(x) mayhem (18-5001, Idaho Code);
(y) rape (18-6101, Idaho Code);
(z) male rape (18-6108, Idaho Code);
(aa) robbery (18-6501, Idaho Code);
(bb) ritualized abuse of a child (18-1506A, Idaho Code);
(cc) cannibalism (18-5003, Idaho Code);
(dd) felonious manufacture, delivery or possession with the intent to manufacture or deliver, or possession of a controlled or counterfeit substance (37-2732, Idaho Code);
(ee) trafficking (37-2732B, Idaho Code);
(ff) threats against state officials of the executive, legislative or judicial branch, felony (18-1353A, Idaho Code);
(gg) unlawful discharge of a firearm at a dwelling house, occupied building, vehicle or mobile home (18-3317, Idaho Code);
(hh) unlawful possession of destructive devices (18-3319, Idaho Code);
(ii) unlawful use of destructive device or bomb (18-3320, Idaho Code);
(jj) attempt (18-306, Idaho Code), conspiracy (18-1701, Idaho Code), or solicitation (18-2001, Idaho Code), to commit any of the crimes described in paragraphs (a) through (ii) of this subsection.
(kk) The provisions of this subsection shall apply only to those persons convicted of the enumerated felonies in paragraphs (a) through (jj) of this subsection on or after July 1, 1991, except that persons convicted of the felonies enumerated in paragraphs (s) and (t) of this subsection, for any degree of murder or voluntary manslaughter, shall not be restored the right to ship, transport,

possess or receive a firearm regardless of the date of their conviction if the conviction was the result of an offense committed by use of a firearm.

(3) A person not restored to the civil right to ship, transport, possess or receive a firearm may make application to the commission of pardons and parole to restore the civil right to ship, transport, possess or receive a firearm. The commission shall not accept any such application until five (5) years after the date of final discharge. The commission shall conduct the proceeding upon such application pursuant to rules adopted in accordance with the law. The commission shall not restore the right to ship, transport, possess or receive a firearm to any person convicted of murder in the first degree (18-4003, Idaho Code), murder in the second degree (18-4003, Idaho Code), or any felony enumerated in paragraphs (a) through (jj) of subsection (2), upon which the sentence was enhanced for the use of a firearm during the commission of said felony.

Illinois Constitution
Article III. Suffrage and Elections
§ 2. Voting Disqualifications

A person convicted of a felony, or otherwise under sentence in a correctional institution or jail, shall lose the right to vote, which right shall be restored not later than upon completion of his sentence.

Ill. Rev. Stat. Ch. 10.
Article 3. Qualification of voters
5/3-5. Convicts

§ 3-5. No person who has been legally convicted, in this or another State or in any federal court, of any crime, and is serving a sentence of confinement in any penal institution, or who has been convicted under any section of this Act and is serving a sentence of confinement in any penal institution, shall vote, offer to vote, attempt to vote or be permitted to vote at any election until his release from confinement.

Indiana Constitution
Article 2. Suffrage and Election.
§ 8 Conviction of infamous crime

Section 8. The General Assembly shall have power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime.

Ind. Code Ann.
§3-7-13-4 Disfranchisement of prisoners

Sec. 4. (a) A person who is:

(1) convicted of a crime; and
(2) imprisoned following conviction;

is deprived of the right of suffrage by the general assembly pursuant to Article 2, Section 8 of the Constitution of the State of Indiana.

(b) A person described in subsection (a) is ineligible

to register under this article during the period that the person is:

(1) imprisoned; or
(2) otherwise subject to lawful detention.

Iowa Constitution
Article II. Right of suffrage
§ 5. Disqualified persons

No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector.

Iowa Code
Title II. Elections and Official Duties
§ 48A.6. Disqualified electors

The following persons are disqualified from registering to vote and from voting:

1. A person who has been convicted of a felony as defined in section 701.7, or convicted of an offense classified as a felony under federal law. If the person's rights are later restored by the governor, or by the president of the United States, the person may register to vote.

Kan. Stat. Ann.
Chapter 21. Crimes and Punishments
§ 21-4615. Rights of imprisoned persons; restoration.

(1) A person who has been convicted in any state or federal court of a felony shall, by reason of such conviction, be ineligible to hold any public office

under the laws of the state of Kansas, or to register as a voter or to vote in any election held under the laws of the state of Kansas or to serve as a juror in any civil or criminal case.

(2) The ineligibilities imposed by this section shall attach upon conviction and shall continue until such person has completed the terms of the authorized sentence.

(3) The ineligibilities imposed upon a convicted person by this section shall be in addition to such other penalties as may be provided by law.

Kentucky Constitution
§ 145. Persons Entitled to Vote

Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct and not elsewhere but the following persons are excepted and shall not have the right to vote.

1. Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.

2. Persons who, at the time of the election, are in confinement under the judgment of a court for some penal offense.

3. Idiots and insane persons.

Ky. Rev. Stat. Ann.
§116.113 Removal of voter's name by state board upon notice of death, declaration of incompetency, or conviction of felony; notice to county clerk

(1) Upon receipt of notification from the Cabinet for Health Services or other reliable sources of the death of a person, the State Board of Elections shall within five (5) days cause the removal of the name of that person from the voter registration records it maintains, except that no voter's name may be removed during the period of time the registration books are closed for any primary, general, or special election.

(2) Upon receipt of notification from the circuit clerk that a person has been declared incompetent, the State Board of Elections shall within five (5) days cause the removal of the name of that person from the voter registration records it maintains, except that no voter's name may be removed during the period of time the registration books are closed for any primary, general, or special election.

(3) Upon receipt of notification from the Administrative Office of the Courts that a person has been convicted of a felony offense, the State Board of Elections shall within five (5) days cause the removal of the name of that person from the voter registration records it maintains, except that no voter's name may be removed during the period of time the registration books are closed for any

primary, general, or special election.

(4) Following the purge of a name from the records of the State Board of Elections, the state board shall notify the clerk of the county in which the voter lived of the action; and the county clerk shall within ten (10) days update the county voter registration files to reflect the necessary change. If a protest is filed by the voter, the county board shall hear it at its next regular monthly meeting. If the county board decides in favor of the protesting voter, the voter's registration record shall be restored, including his voting record. If the protest is filed while the registration books are closed and the county board decides in favor of the protesting voter, the county board shall issue the voter an "Authorization to Vote" for the upcoming election and the voter's record shall be restored when the registration books open following the election.

Louisiana Constitution
Article I, Declaration of Rights
§ 10. Right to Vote; Disqualification From Seeking or Holding an Elective Office

(A) Right to Vote. Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote, except that this right may be suspended while a person is interdicted and judicially declared mentally incompetent or is under an order of imprisonment for conviction of a felony.

(B) Disqualification. The following persons shall not be permitted to qualify as a candidate for elective public office or take public elective office or appointment of honor, trust, or profit in this state:

(1) A person who has been convicted within this state of a felony and who has exhausted all legal remedies, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be a felony and who has exhausted all legal remedies and has not afterwards been pardoned either by the governor of this state or by the officer of the state, nation, government or country having such authority to pardon in the place where the person was convicted and sentenced.

(2) A person actually under an order of imprisonment for conviction of a felony.

(C) Exception. Notwithstanding the provisions of Paragraph (B) of this Section, a person who desires to qualify as a candidate for or hold an elective office, who has been convicted of a felony and who has served his sentence, but has not been pardoned for such felony, shall be permitted to qualify as a candidate for or hold such office if the date of his qualifying for such office is more than fifteen years after the date of the completion of his original sentence.

La. Rev. Stat. Ann.
Title 18. Louisiana Election Code
§ 102. Ineligible persons

A. No person shall be permitted to register or vote who is:

(1) Under an order of imprisonment, as defined in R.S. 18:2(8), for conviction of a felony; or

(2) Interdicted after being judicially declared to be mentally incompetent.

B. Notwithstanding the provisions of Paragraph (A)(1) of this Section or any other provision of law to the contrary, a person who was convicted of a felony prior to the effective date of the 1974 Constitution of Louisiana who has fully satisfied and completed his sentence shall not be ineligible to register to vote, nor shall he be prohibited from voting, based upon that conviction.

Maryland Constitution
Article I. Elective Franchise
§ 4. Persons convicted of serious crimes; mentally disabled

The General Assembly by law may regulate or prohibit the right to vote of a person convicted of infamous or other serious crime or under care or guardianship for mental disability.

Md. Code Ann.
Title 3. Voter registration
§ 3-102. Qualifications for voter registration

(b) An individual is not qualified to be a registered voter if the individual:

(1) has been convicted of theft or other infamous crime, unless the individual:

(i) has been pardoned; or

(ii) 1. in connection with a first conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines; or

2. in connection with a subsequent conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines, and at least 3 years have elapsed since the completion of the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines;

(2) is under guardianship for mental disability; or

(3) has been convicted of buying or selling votes.

Massachusetts Constitution
Articles of Amendment
Art. CXX. Voting by incarcerated felons

ART. III. Every citizen of eighteen years of age and upwards, excepting persons who are incarcerated in a correctional facility due to a felony conviction, and, excepting persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators or representatives, shall have a right to vote in such election of governor, lieutenant governor, senators and

representatives; and no other person shall be entitled to vote in such election.

2001 Mass. Acts Ch. 150
Elections–Voting Rights–Disqualifying Convicted Felons

AN ACT relative to the right of incarcerated felons to vote.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to disqualify forthwith all incarcerated felons from voting in elections, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 1 of chapter 50 of the General Laws, as appearing in the 2000 Official Edition, is hereby amended by inserting after the word "jail", in line 131, the following words:--, except if by reason of a felony conviction.

SECTION 2. Section 1 of chapter 51 of the General Laws, as so appearing, is hereby amended by inserting after the word "guardianship", in line 2, the following words:--or incarcerated in a correctional facility due to a felony conviction,.

Michigan Constitution
Article II. Elections
§ 2. Mental incompetence; imprisonment

Sec. 2. The legislature may by law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution.

Mich. Comp. Laws Ann.
§168.758. Absent voter; definition

Sec. 758. (1) For the purposes of this act, "absent voter" means a qualified and registered elector who meets 1 or more of the following requirements:

(a) On account of physical disability, cannot without another's assistance attend the polls on the day of an election.

(b) On account of the tenets of his or her religion, cannot attend the polls on the day of election.

(c) Cannot attend the polls on the day of an election in the precinct in which he or she resides because of being an election precinct inspector in another precinct.

(d) Is 60 years of age or older.

(e) Is absent or expects to be absent from the township or city in which he or she resides during the entire period the polls are open for voting on the day of an election.

(f) Cannot attend the polls on election day because of being confined in jail awaiting arraignment or trial.

(2) Subsection (1) does not apply to a person who has moved outside of this state, regardless of length of his or her residence outside of this state, and who no longer maintains an actual residence in this state. The storage of personal effects or household goods, the ownership of property that is rented or leased to others, or occasional brief visits to a former domicile in this state while residing outside of this state for most of the year does not constitute a residence for voting purposes in this state, except for each of the following:

(a) A person described in section 1 of article II of the state constitution of 1963 and statutes enacted under that section.

(b) A person described in section 759a.

Minnesota Constitution
Article VII. Elective franchise
§ 1. Eligibility; place of voting; ineligible, persons

Section 1. Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence within 30 days preceding the election shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless restored to civil rights; a person under

guardianship, or a person who is insane or not mentally competent

Minn. Stat. Ann.
§201.014. Eligibility to vote

Subdivision 1. Requirements. Except as provided in subdivision 2, an individual who meets the following requirements at the time of an election is eligible to vote. The individual must:

(a) Be 18 years of age or older;

(b) Be a citizen of the United States; and

(c) Maintain residence in Minnesota for 20 days immediately preceding the election.

Subd. 2. Not eligible. The following individuals are not eligible to vote. Any individual:

(a) Convicted of treason or any felony whose civil rights have not been restored;

(b) Under a guardianship of the person in which the court order provides that the ward does not retain the right to vote; or

(c) Found by a court of law to be legally incompetent.

Subd. 3. Penalty. Any individual who votes who knowingly is not eligible to vote is guilty of a felony.

Mississippi Constitution
Article 12. Franchise
Section 241. Qualifications for electors

Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector, except that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector.

Mo. Rev. Stat.
Chapter 115. Election authorities and conduct of elections
§ 115.133. Qualifications of voters

1. Except as provided in subsection 2 of this section, any citizen of the United States who is a resident of the State of Missouri and seventeen years and six months of age or older shall be entitled to register and to vote in any election which is held on or after his eighteenth birthday.

2. No person who is adjudged incapacitated shall be entitled to register or vote. No person shall be entitled to vote:

(1) While confined under a sentence of imprisonment;

(2) While on probation or parole after conviction of a felony, until finally discharged from such probation or parole; or

(3) After conviction of a felony or misdemeanor connected with the right of suffrage.

3. Except as provided in federal law or federal elections and in section 115.277, no person shall be entitled to vote if the person has not registered to vote in the jurisdiction of his or her residence prior to the deadline to register to vote.

Montana Constitution
Article IV. Suffrage and Elections
§ 2. Qualified elector

Any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector unless he is serving a sentence for a felony in a penal institution or is of unsound mind, as determined by a court.

Nebraska Constitution
Article VI. Suffrage
§ 2. Who disqualified.

No person shall be qualified to vote who is non compos mentis, or who has been convicted of treason or felony under the laws of the state or of the United States, unless restored to civil rights..

Neb. Rev. Stat.

§ 32-313. Qualifications of elector; abstract of felony convictions; clerks of court; duty; notification of federal court felony conviction; how treated.

(1) No person shall be qualified to vote or to register to vote who is non compos mentis or who has been convicted of treason or a felony under the laws of the state or of the United States unless restored to civil rights.

(2) The clerk of any court in which a person is convicted of a felony shall prepare an abstract each month of each final judgment served by the clerk convicting an elector of a felony. The clerk shall file the abstract with the election commissioner or county clerk of the elector's county of residence not later than the tenth day of the month following the month in which the abstract is prepared. The clerk of the court shall notify the election commissioner or county clerk in writing if any such conviction is overturned.

(3) Upon receiving notification from the United States Attorney of a felony conviction of a Nebraska resident in federal court or of the overturning of any such conviction, the Secretary of State shall forward the notice to the election commissioner or county clerk of the county of such person's residence. The election commissioner or county clerk shall remove the name of such person from the voter registration register upon receipt of notice of conviction.

Nevada Constitution
Article 2. Right of Suffrage
§ 1. Right to vote; qualifications of elector; qualifications of nonelector to vote for President and Vice President of United States

All citizens of the United States (not laboring under the disabilities named in this constitution) of the age of eighteen years and upwards, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now or hereafter may be elected by the people, and upon all questions submitted to the electors at such election; *provided,* that no person who has been or may be convicted of treason or felony in any state or territory of the United States, unless restored to civil rights, and no idiot or insane person shall be entitled to the privilege of an elector. There shall be no denial of the elective franchise at any election on account of sex. The legislature may provide by law the conditions under which a citizen of the United States who does not have the status of an elector in another state and who does not meet the residence requirements of this section may vote in this state for President and Vice President of the United States.

N.H. Rev. Stat. Ann.
Chapter 607-a. Uniform act on status of convicted persons
607-A:2. Rights Lost.

I. A person sentenced for a felony, from the time of his sentence until his final discharge, may not:

(a) Vote in an election, but if execution of sentence is suspended with or without the defendant being placed on probation or he is paroled after commitment to imprisonment, he may vote during the period of the suspension or parole; or

(b) Become a candidate for or hold public office.

II. A public office held at the time of sentence is forfeited as of the date of the sentence if the sentence is in this state or, if the sentence is in another state or in a federal court, as of the date a certification of the sentence from the sentencing court is filed in the office of secretary of state, who shall receive and file it as a public document. An appeal or other proceeding taken to set aside or otherwise nullify the conviction or sentence does not affect the application of this section, but if the conviction is reversed the defendant shall be restored to any public office forfeited under this chapter from the time of the reversal and shall be entitled to the emoluments thereof from the time of the forfeiture.

New Jersey Constitution
Article II. Elections and suffrage
Section I

7. The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right.

New York Constitution
Article II. Suffrage
§ 3. [Persons excluded from the right of suffrage]

No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election; and upon challenge for such cause, the person so challenged, before the officers authorized for that purpose shall receive his or her vote, shall swear or affirm before such officers that he or she has not received or offered, does not expect to receive, has not paid, offered or promised to pay, contributed, offered or promised to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at such election, and has not made any promise to influence the giving or withholding of any such vote, nor made or become directly or indirectly interested in any bet or wager depending upon the result of such election. The legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.

N.M. Stat. Ann.
Chapter 31. Criminal procedure
Article 13. Civil rights and pardons
§ 31-13-1. Felony conviction; restoration of citizenship

A. A person who has been convicted of a felony shall not be permitted to vote in any statewide, county, municipal or district election held pursuant to the provisions of the Election Code, unless the person:

(1) has completed the terms of a suspended or deferred sentence imposed by a court;

(2) was unconditionally discharged from a correctional facility under the jurisdiction of the corrections department or was conditionally discharged from a correctional facility under the jurisdiction of the corrections department and has completed all conditions of probation or parole;

(3) was unconditionally discharged from a correctional facility under the jurisdiction of a federal corrections agency or was conditionally discharged from a correctional facility under the jurisdiction of a federal corrections agency and has completed all conditions of probation or parole; or

(4) has presented the governor with a certificate verifying the completion of his sentence and was granted a pardon or a certificate by the governor restoring his full rights of citizenship.

B. A person who has served the entirety of a sentence imposed for a felony conviction, including a term of probation or parole shall, upon his request to the

corrections department, be issued a certificate of completion by the corrections department. Presentation of the certificate of completion to a county clerk shall entitle the person to register to vote. Additionally, a county clerk may accept the following documents as proof that a person has served the entirety of his sentence for a felony conviction:

(1) a judgment and sentence from a court of this state, another state or the federal government, which shows on its face that the person has completed the entirety of his sentence; or

(2) a certificate of completion from another state or the federal government.

C. A person who has been convicted of a felony shall not be permitted to hold an office of public trust for the state, a county, a municipality or a district, unless the person has presented the governor with a certificate verifying the completion of his sentence and was granted a pardon or a certificate by the governor restoring his full rights of citizenship.

North Carolina Constitution
Article VI. Suffrage and eligibility to office
§ 2. Qualifications of voter

(1) Residence period for State elections. Any person who has resided in the State of North Carolina for one year and in the precinct, ward, or other election district for 30 days next preceding an election, and possesses the other qualifications set out in this Article, shall be entitled to vote at any election held in this State. Removal from one precinct, ward, or

other election district to another in this State shall not operate to deprive any person of the right to vote in the precinct, ward, or other election district from which that person has removed until 30 days after the removal.

(2) Residence period for presidential elections. The General Assembly may reduce the time of residence for persons voting in presidential elections. A person made eligible by reason of a reduction in time of residence shall possess the other qualifications set out in this Article, shall only be entitled to vote for President and Vice President of the United States or for electors for President and Vice President, and shall not thereby become eligible to hold office in this State.

(3) Disqualification of felon. No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

North Carolina Constitution
Article VI. Suffrage and eligibility to office
§ 8. Disqualifications for office

The following persons shall be disqualified for office:

First, any person who shall deny the being of Almighty God.

Second, with respect to any office that is filled by election by the people, any person who is not

qualified to vote in an election for that office.

Third, any person who has been adjudged guilty of treason or any other felony against this State or the United States, or any person who has been adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, or any person who has been adjudged guilty of corruption or malpractice in any office, or any person who has been removed by impeachment from any office, and who has not been restored to the rights of citizenship in the manner prescribed by law.

N.C. Gen. Stat.
§ 13-1. Restoration of citizenship

Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:

(1) The unconditional discharge of an inmate by the State Department of Correction or the North Carolina Department of Correction, of a probationer by the State Department of Correction, or of a parolee by the Department of Correction; or of a defendant under a suspended sentence by the court.

(2) The unconditional pardon of the offender.

(3) The satisfaction by the offender of all conditions of a conditional pardon.

(4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United

States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

(5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

N.C. Gen. Stat.
Chapter 163. Elections and election laws
§ 163-55. Qualifications to vote; exclusion from electoral franchise

Every person born in the United States, and every person who has been naturalized, and who shall have resided in the State of North Carolina and in the precinct in which he offers to register and vote for 30 days next preceding the ensuing election, shall, if otherwise qualified as prescribed in this Chapter, be qualified to register and vote in the precinct in which he resides: Provided, that removal from one precinct to another in this State shall not operate to deprive any person of the right to vote in the precinct from which he has removed until 30 days after his removal.

The following classes of persons shall not be allowed to register or vote in this State:

(1) Persons under 18 years of age.

(2) Any person adjudged guilty of a felony against this State or the United States, or adjudged guilty of

a felony in another state that also would be a felony if it had been committed in this State, unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

North Dakota Constitution
Article II. Elective Franchise
§ 2.

No person who has been declared mentally incompetent by order of a court or other authority having jurisdiction, which order has not been rescinded, shall be qualified to vote. No person convicted of a felony shall be qualified to vote until his or her civil rights are restored.

N.D. Cent. Code
Title 12.1. Criminal code
Chapter 12.1-33. Rights of convicts
§ 12.1-33-01. Rights lost.

1. A person sentenced for a felony to a term of imprisonment, during the term of actual incarceration under such sentence, may not:

a. Vote in an election; or

b. Become a candidate for or hold public office.

2. A public office, other than an office held by one subject to impeachment, held at the time of sentence is forfeited as of the date of the sentence if the sentence is in this state, or, if the sentence is in another state or in a federal court, as of the date a certification of the sentence from the sentencing

court is filed in the office of the secretary of state who shall receive and file it as a public document. An appeal or other proceeding taken to set aside or otherwise nullify the conviction or sentence does not affect the application of this section, but if the conviction is reversed, the defendant shall be restored to any public office forfeited under this section from the time of the reversal and shall be entitled to the emoluments thereof from the time of the forfeiture.

Ohio Rev. Code Ann.
Title XXIX. Crimes--procedure
Chapter 2961. Disfranchised convicts; habitual criminals
§ 2961.01. Civil rights of convicted felons

(A) A person convicted of a felony under the laws of this or any other state or the United States, unless the conviction is reversed or annulled, is incompetent to be an elector or juror or to hold an office of honor, trust, or profit. When any person convicted of a felony under any law of that type is granted parole, judicial release, or a conditional pardon or is released under a non-jail community control sanction or a post-release - control sanction, the person is competent to be an elector during the period of community control, parole, post-release control, or release or until the conditions of the pardon have been performed or have transpired and is competent to be an elector thereafter following final discharge. The full pardon of a convict restores the rights and privileges so forfeited under this section, but a pardon shall not release a convict from the costs of the convict's conviction in this state, unless so specified.

(B) As used in this section:

(1) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(2) "Non-jail community control sanction" means a community control sanction that is neither a term in a community-based correctional facility nor a term in a jail.

(3) "Post-release control" and "post-release control sanction" have the same meanings as in section 2967.01 of the Revised Code.

Okla. Stat. Ann.
Title 26. Elections
§ 4-101. Persons entitled to become registered voters–Exceptions

Every person who is a qualified elector as defined by Section 1 of Article III of the Oklahoma Constitution shall be entitled to become a registered voter in the precinct of his residence, with the following exceptions:

1. Persons convicted of a felony shall be ineligible to register for a period of time equal to the time prescribed in the judgment and sentence.

2. Any person who has been adjudged to be an incapacitated person as such term is defined by Section 1-111 of Title 30 of the Oklahoma Statutes, shall be ineligible to register to vote. When such incapacitated person has been adjudged to be no longer incapacitated such person shall be eligible to

become a registered voter. The provisions of this paragraph shall not prohibit any person adjudged to be a partially incapacitated person as such term is defined by Section 1-111 of Title 30 of the Oklahoma Statutes from being eligible to register to vote unless the order adjudging the person to be partially incapacitated restricts such persons from being eligible to register to vote.

Oregon Constitution
Article II. Suffrage and elections
§ 3. Rights of electors

A person suffering from a mental handicap is entitled to the full rights of an elector, if otherwise qualified, unless the person has been adjudicated incompetent to vote as provided by law. The privilege of an elector, upon conviction of any crime which is punishable by imprisonment in the penitentiary, shall be forfeited, unless otherwise provided by law.

Or. Rev. Stat.
§ 137.281. Withdrawal of rights during imprisonment; restoration of rights

(1) In any felony case, when the court sentences the defendant to a term of imprisonment in the custody of the Department of Corrections and execution of the sentence is not suspended, or execution is suspended upon condition that the defendant serve a term of imprisonment in the county jail, the defendant is deprived of all rights and privileges described in subsection (3) of this section from the date of sentencing until:

(a) The defendant is discharged or paroled from imprisonment; or

(b) The defendant's conviction is set aside.

(2) In any felony case, when the court sentences the defendant to a term of imprisonment in the custody of the Department of Corrections and execution of the sentence is suspended upon any condition other than imprisonment in the county jail, if the sentence of probation is revoked and the suspended portion of the sentence is ordered executed, the defendant is deprived of the rights and privileges described in subsection (3) of this section from the date the sentence is ordered executed until:

(a) The defendant is discharged or paroled from imprisonment; or

(b) The defendant's conviction is set aside.

(3) The rights and privileges of which a person may be deprived under this section are:

(a) Holding a public office or an office of a political party or becoming or remaining a candidate for either office;

(b) Holding a position of private trust;

(c) Acting as a juror; or

(d) Exercising the right to vote.

(4) If the court under subsection (1) of this section temporarily stays execution of sentence for any

purpose other than probation, the defendant nonetheless is sentenced for purposes of subsection (1) of this section.

(5) A person convicted of any crime and serving a term of imprisonment in any federal correctional institution in this state is deprived of the rights to register to vote, update a registration or vote in any election in this state from the date of sentencing until:

(a) The person is discharged or paroled from imprisonment; or

(b) The person's conviction is set aside.

(6) The county clerk or county official in charge of elections in any county may cancel the registration of any person serving a term of imprisonment in any federal correctional institution in this state.

(7) Except as otherwise provided in ORS 10.030, the rights and privileges withdrawn by this section are restored automatically upon discharge or parole from imprisonment, but in the case of parole shall be automatically withdrawn upon a subsequent imprisonment for violation of the terms of the parole.

Pa. Con. Stat. Ann.
Title 25. Elections
§ 1301. Qualifications to register

(a) Eligibility.—An individual who will be at least 18 years of age on the day of the next election, who has been a citizen of the United States for at least one month prior to the next election and who has

resided in this Commonwealth and the election district where the individual offers to vote for at least 30 days prior to the next ensuing election and has not been confined in a penal institution for a conviction of a felony within the last five years shall be eligible to register as provided in this chapter.

(b) Effect.–No individual shall be permitted to vote at any election unless the individual is registered under this subsection, except as provided by law or by order of a court of common pleas. No registered elector shall be required to register again for any election while the elector continues to reside at the same address.

(c) Removal of residence.–Except as otherwise provided by this part, a registered elector who removes residence from one place to another outside the elector's last election district shall not be entitled to vote in the election district of the elector's last residence except pursuant to the provisions of this section and sections 1501(b) (relating to removal notices), 1502 (relating to transfer of registration) and 1902 (relating to procedure for voting following failure to return notification card).

Pa. Election Code § 102(w)
Article I. Preliminary Provisions
Pennsylvania Election Code
§ 2602. Definitions.

(w) The words "**qualified absentee elector**" shall mean:

Any qualified elector who is or who may be in the military service of the United States regardless of

whether at the time of voting he is present in the election district of his residence or is within or without this Commonwealth and regardless of whether he is registered or enrolled; or Any qualified elector who is a spouse or dependent residing with or accompanying a person in the military service of the United States if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or Any qualified elector who is or who may be in the service of the Merchant Marine of the United States if at the time of voting he is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

Any qualified elector who is a spouse or dependent residing with or accompanying a person who is in the service of the Merchant Marine of the United States if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

Any qualified elector who is or who may be in a religious or welfare group officially attached to and serving with the armed forces if at the time of voting he is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

Any qualified elector who is a spouse or dependent residing with or accompanying a person in a religious or welfare group officially attached to and serving with the armed forces if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

Any qualified elector who expects to be or is outside the territorial limits of the several States of the United States and the District of Columbia because his duties, occupation or business require him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election or who is or who may be a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia, whether or not such elector is subject to civil-service laws and the Classification Act of 1949 and whether or not paid from funds

appropriated by the Congress, if at the time of voting he is absent from the municipality of his residence: Provided, however, That said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

Any qualified elector who is a spouse or dependent residing with or accompanying a person who expects to be or is outside the territorial limits of the several States of the United States and the District of Columbia because his duties, occupation or business require him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election or who is a spouse or dependent residing with or accompanying a person who is a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia whether or not such person is subject to civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

Any qualified war veteran elector who is bedridden or hospitalized due to illness or physical disability if he is absent from the municipality of his

residence and unable to attend his polling place because of such illness or physical disability regardless of whether he is registered and enrolled; or Any qualified, registered and enrolled elector who expects to be or is absent from the municipality of his residence because his duties, occupation or business require him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election; or

Any qualified, registered and enrolled elector who is unable to attend his polling place because of illness or physical disability; or

Any qualified, registered and enrolled elector who is a spouse or dependent accompanying a person employed in the service of this Commonwealth or in the service of the Federal Government within the territorial limits of the several States of the United States and the District of Columbia in the event the duties, profession or occupation of such person require him to be absent from the municipality of his residence; or

Any qualified elector who is a county employee who cannot vote due to duties on election day relating to the conduct of the election; or

Any qualified elector who will not attend a polling place because of the observance of a religious holiday: Provided, however, That the words "qualified absentee elector" shall in nowise be construed to include persons confined in a penal institution or a mental institution nor shall it in anywise be construed to include a person not otherwise qualified as a qualified elector in

accordance with the definition set forth in section 102(t) of this act.

Rhode Island Constitution
Article II. Of Suffrage
§ 1. Persons entitled to vote

Every citizen of the United States of the age of eighteen years or over who has had residence and home in this state for thirty days next preceding the time of voting, who has resided thirty days in the town or city from which such citizen desires to vote, and whose name shall be registered at least thirty days next preceding the time of voting as provided by law, shall have the right to vote for all offices to be elected and on all questions submitted to the electors, except that no person who has been lawfully adjudicated to be non compos mentis shall be permitted to vote. No felon shall be permitted to vote until completion of such felon's sentence, served or suspended, and of parole or probation regardless of a nolo contendere plea. Upon such completion, such person's right to vote shall be restored. The general assembly may provide by law for shorter state and local residence requirements to vote for electors for president and vice president of the United States.

S.C. Code Ann.
§ 7-5-120. Qualifications for registration; persons disqualified from registering or voting.

(A) Every citizen of this State and the United States who applies for registration must be registered if he meets the following qualifications:

(1) meets the age qualification as provided in

Section 4, Article II of the Constitution of this State;

(2) is not laboring under disabilities named in the Constitution of 1895 of this State; and

(3) is a resident in the county and in the polling precinct in which the elector offers to vote.

(B) A person is disqualified from being registered or voting if he:

(1) is mentally incompetent as adjudicated by a court of competent jurisdiction; or

(2) is serving a term of imprisonment resulting from a conviction of a crime; or

(3) is convicted of a felony or offenses against the election laws, unless the disqualification has been removed by service of the sentence, including probation and parole time unless sooner pardoned.

South Dakota Constitution
§ 2. Voter Qualification.

Every United States citizen eighteen years of age or older who has met all residency and registration requirements shall be entitled to vote in all elections and upon all questions submitted to the voters of the state unless disqualified by law for mental incompetence or the conviction of a felony. The Legislature may by law establish reasonable requirements to insure the integrity of the vote.

Tennessee Constitution
Article IV. Elections
§ 2. Disqualification for commission of crime

Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes.

Tenn. Code Ann.
§ 40-20-112. Felony convictions; voting rights; testimony

Upon conviction for any felony, it shall be the judgment of the court that the defendant be infamous and be immediately disqualified from exercising the right of suffrage. No person so convicted shall be disqualified to testify in any action, civil or criminal, by reason of having been convicted of any felony, and the fact of conviction for any felony may only be used as a reflection upon the person's credibility as a witness.

Texas Constitution
Article VI. Suffrage
§ 1. Classes of persons not allowed to vote

Sec. 1. (a) The following classes of persons shall not be allowed to vote in this State:

(1) persons under 18 years of age;

(2) persons who have been determined mentally incompetent by a court, subject to such exceptions as the Legislature may make; and

(3) persons convicted of any felony, subject to such

exceptions as the Legislature may make.

(b) The legislature shall enact laws to exclude from the right of suffrage persons who have been convicted of bribery, perjury, forgery, or other high crimes.

Tex. Elec. Code Ann.
§ 11.002(4). Qualified Voter

(4) has not been finally convicted of a felony or, if so convicted, has:

(A) fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court; or

(B) been pardoned or otherwise released from the resulting disability to vote;

Utah Constitution
Article IV. Elections and right of suffrage
§ 6. [Mentally incompetent persons, convicted felons, and certain criminals ineligible to vote.]

Any mentally incompetent person, any person convicted of a felony, or any person convicted of treason or a crime against the elective franchise, may not be permitted to vote at any election or be eligible to hold office in this State until the right to vote or hold elective office is restored as provided by statute.

Virginia Constitution
Article II. Franchise and officers
§ 1. Qualifications of voters

In elections by the people, the qualifications of voters shall be as follows: Each voter shall be a citizen of the United States, shall be eighteen years of age, shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this article. No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority. As prescribed by law, no person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished.

The residence requirements shall be that each voter shall be a resident of the Commonwealth and of the precinct where he votes. Residence, for all purposes of qualification to vote, requires both domicile and a place of abode. The General Assembly may provide for persons who are employed overseas, and their spouses and dependents residing with them, and who are qualified to vote except for relinquishing their place of abode in the Commonwealth while overseas, to vote in the Commonwealth subject to conditions and time limits defined by law. The General Assembly may provide for persons who are qualified to vote except for having moved their residence from one precinct to another within the Commonwealth to continue to vote in a former precinct subject to conditions and time limits defined by law. The General Assembly may also provide, in elections for President and Vice-President of the United States, alternatives to registration for new residents of the

Commonwealth.

Any person who will be qualified with respect to age to vote at the next general election shall be permitted to register in advance and also to vote in any intervening primary or special election.

Va. Code Ann.
§ 24.2-409. Division of Criminal Records to transmit monthly lists of felony convictions to State Board.

The Division of Central Criminal Records Exchange shall transmit to the State Board by electronic means a monthly list of all persons convicted of a felony during the preceding month. The list shall be in a format specified by the State Board and shall contain the convicted person's name; address; county, city or town of residence; social security number, if any; date and place of birth; and date of conviction. The Board shall maintain a permanent record of the information in the lists as part of the voter registration system. The general registrars shall have access to the information in the lists to carry out their duties pursuant to § 24.2-427.

Va. Code Ann.
§ 24.2-418. Application for registration.

Each applicant to register shall provide, subject to felony penalties for making false statements pursuant to § 24.2-1016, the information necessary to complete the application to register. Unless physically disabled, he shall sign the application. The application to register shall be only on a form or forms prescribed by the State Board. The form of the

application to register shall require the applicant to provide the following information: full name; gender; date of birth; social security number, if any; whether the applicant is presently a United States citizen; address of residence in the precinct; place of last previous registration to vote; and whether the applicant has ever been adjudicated incapacitated or convicted of a felony, and if so, under what circumstances the applicant's right to vote has been restored. The form shall permit any active or retired law-enforcement officer, as defined in § 9.1-101 and in 5 U.S.C.A. § 8331 (20) but excluding officers whose duties relate to detention as defined in paragraphs (A) through (D) of § 8331 (20), to furnish, in addition to his residence street address, a post office box address located within the Commonwealth to be included in lieu of his street address on the lists of registered voters and persons who voted, which are furnished pursuant to §§ 24.2-405 and 24.2-406, or on voter registration records made available for public inspection pursuant to § 24.2-444. The form shall permit any party granted a protective order issued by or under the authority of any court of competent jurisdiction, including but not limited to courts of the Commonwealth of Virginia, to furnish, in addition to his street address, a post office box address located within the Commonwealth to be included in lieu of his street address on the lists of registered voters and persons who voted, which are furnished pursuant to §§ 24.2-405 and 24.2-406, or on voter registration records made available for public inspection pursuant to § 24.2-444.

Va. Code Ann.
§ 24.2-427. Cancellation of registration by voter or for persons known to be deceased or disqualified to vote.

A. Any registered voter may cancel his registration and have his name removed from the central registration records by signing an authorization for cancellation and mailing or otherwise submitting the signed authorization to the general registrar. When submitted by any means other than when notarized or in person, such cancellation must be made at least twenty-nine days prior to an election in order to be valid in that election. The general registrar shall acknowledge receipt of the authorization and advise the voter in person or by first-class mail that his registration has been canceled within ten days of receipt of such authorization.

B. The general registrar shall cancel the registration of (i) all persons known by him to be deceased or disqualified to vote by reason of a felony conviction or adjudication of incapacity and (ii) all persons for whom a notice has been received, signed by the voter or the registration official of another jurisdiction, that the voter has moved from the Commonwealth. The notice received in clause (ii) shall be considered as a written request from the voter to have his registration cancelled. A voter's registration may be cancelled at any time during the year in which the general registrar discovers that the person is no longer entitled to be registered.

C. The general registrar may cancel the registration of any person for whom a notice has been submitted to the Department of Motor Vehicles in accordance

with the Driver License Compact set out in Article 18 (§ 46.2-483 et seq.) of Chapter 3 of Title 46.2 and forwarded to the general registrar, that the voter has moved from the Commonwealth; provided that the registrar shall mail notice of such cancellation to the person at both his new address, as reported to the Department of Motor Vehicles, and the address at which he had most recently been registered in Virginia. No general registrar may cancel registrations under this authority while the registration records are closed pursuant to § 24.2-416. No registrar may cancel the registration under this authority of any person entitled to register under the provisions of subsection A of § 24.2-420.1, and shall reinstate the registration of any otherwise qualified voter covered by subsection A of § 24.2-420.1 who applies to vote within four years of the date of cancellation.

West Virginia Constitution
Article IV. § 1. Elections and Officers

The male citizens of the State shall be entitled to vote at all elections held within the counties in which they respectively reside; but no person who is a minor, or of unsound mind, or a pauper, or who is under conviction of treason, felony, or bribery in an election, or who has not been a resident of the State for one year, and of the county in which he offers to vote, for sixty days next preceding such offer, shall be permitted to vote while such disability continues; but no person in the military, naval or marine service of the United States shall be deemed a resident of this State by reason of being stationed therein.

Wis. Stat. Ann.
§ 6.03(1)(b). Disqualification of electors

(1) The following persons shall not be allowed to vote in any election and any attempt to vote shall be rejected:

(b) Any person convicted of treason, felony or bribery, unless the person's right to vote is restored through a pardon or under s. 304.078(3).

Wyo. Stat.
Title 22. Elections
Chapter 1. Wyoming Election Code
§ 22-1-102 Definitions.

(xxvi) "Qualified elector" includes every citizen of the United States who is a bona fide resident of Wyoming, has registered to vote and will be at least eighteen (18) years of age on the day of the election at which he may offer to vote. No person is a qualified elector who is a currently adjudicated mentally incompetent person, or who has been convicted of a felony and his civil or voting rights have not been restored. A literacy test shall not be imposed as a condition to voting in any election[.]

(3)

Supreme Court, U.S.
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No. 03-1597

IN THE

Supreme Court of the United States

GARY D. LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON,

Petitioners,

v.

MUHAMMAD SHABAZZ FARRAKHAN, AL KAREEM SHADEED, RAMON BARRIENTES, CLIFTON BRICENO, MARCUS PRICE, AND TIMOTHY SCHAAF,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether § 2 of the Voting Rights Act of 1965, which prohibits any voting qualification or prerequisite to voting that results in the denial of voting rights on account of race, can be applied to the Washington state laws that deny the right to vote to persons convicted of a felony.

PARTIES TO THE PROCEEDING

The Petition for a Writ of Certiorari ("Pet.") correctly identifies the parties to the proceeding below. Respondents wish to inform the Court that, while Respondent Muhammad Shabazz Farrakhan has been referred to by that name consistently throughout the course of these proceedings, his name was not changed to Muhammad Shabazz Farrakhan through formal legal proceedings. Mr. Farrakhan's legal name is Ernest Walker.

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COUNTER-STATEMENT OF THE CASE

This case concerns the scope of § 2 of the Voting Rights Act of 1965 ("VRA" or "Voting Rights Act"), and whether § 2 provides a basis for Respondents to challenge Washington's felon disfranchisement scheme, which denies suffrage to persons upon conviction of a felony.

A. Felon Disfranchisement In Washington State

Washington's statutory scheme for felon disfranchisement is rooted in Article VI, § 3 of the Washington Constitution, App. 93a.[1] The process for revocation of the offender's right to vote is administrative in nature; it is a collateral consequence of "convicted felon" status, not a part of the adjudication of guilt and sentencing of the offender. Upon the offender's conviction, notice is sent to the county auditor who revokes the offender's voter registration, if any. *See* Wash. Rev. Code § 10.64.021, App. 99a (convictions in state court); 42 U.S.C. § 1973gg-6(g) (convictions in federal court). Because loss of the right to vote is based entirely upon the offender's status as a felon, the specific type or degree of the crime for which the offender was convicted plays no role in the automatic revocation of the right to vote. The offender may later seek to reinstate the right to vote through a statutory process. *See* Wash. Rev. Code § 9.94A.637, App. 94a (determinate sentences); *id.* § 9.96.050, App. 97a (indeterminate sentences); *id.* § 9.94A.875 (clemency and pardons board).

B. Procedural History

Respondents in this case are currently denied the right to vote in Washington because they each were convicted of a felony. Muhammad Shabazz Farrakhan (also known as Ernest Walker, *see supra* p. ii), Al Kareem Shadeed, and Marcus Price

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[1] Citations in this format are to the Appendix to the Petition for a Writ of Certiorari.

are African-American; Clifton Briceno and Timothy Schaaf are Native-American; and Ramon Barrientes is Hispanic-American. None of the Respondents is currently eligible for restoration of voting rights under Washington's statutory restoration procedure.

Respondents filed this action in the United States District Court for the Eastern District of Washington, challenging Washington's felon disfranchisement scheme under the Voting Rights Act and the First, Fourth, Fifth, Sixth, Ninth, Fourteenth, and Fifteenth Amendments to the United States Constitution. Respondents argued that felon disfranchisement denies racial minorities the right to vote on the basis of race and has the effect of diluting racial minority voting strength.

Appellants moved to dismiss Respondents' claims pursuant to Fed. R. Civ. P. 12(b)(6). The district court sustained Respondents' claims of vote denial under the Voting Rights Act but dismissed their vote dilution claim under the Act and their Constitutional claims. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1315 (E.D. Wash. 1997), App. 67a, 90a.

Respondents subsequently filed a motion for summary judgment. Respondents presented evidence to support a "totality of circumstances" argument, as required by § 2 of the Voting Rights Act when challenging the racial effects of a voting practice, including the following: evidence of disparities in the treatment of minorities in the criminal justice system; a history of race discrimination in the state of Washington; and the tenuous public policy rationale for felon disfranchisement. Petitioners responded with a cross-motion for summary judgment, arguing that felon disfranchisement is constitutionally permissible, that the VRA was not intended to prohibit felon disfranchisement, and that, even if the VRA applied to felon disfranchisement, Respondents did not present sufficient evidence to satisfy the totality of circumstances analysis.

In its ruling on the cross-motions for summary judgment, the district court found that "the [felon] disenfranchisement provision clearly has a disproportionate impact on racial minorities . . . ." *Farrakhan v. Locke*, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212, at *9 (E.D. Wash. Dec. 1, 2000), App. 54a, 59a, *aff'd in part and rev'd in part sub nom. Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), and that Respondents' "evidence of discrimination within the criminal justice system . . . is compelling," *id.* at *14, App. 62a. Despite these findings, the district court found that this evidence could not be considered within the VRA's totality of circumstances analysis because such evidence creates a "causal chain [that] runs, if at all, to a factor outside of the challenged voting mechanism." *Id.* at *10, App. 59a. After disregarding evidence of disparities within the criminal justice system, the district court held that Respondents failed to provide evidence satisfying the totality of circumstances analysis and granted summary judgment in favor of Petitioners. *Id.* at *18, App. 64a.

Respondents appealed to the United States Court of Appeals for the Ninth Circuit, arguing that the district court erred in failing to consider disparities in Washington's criminal justice system in the context of the VRA's totality of circumstances analysis. The court of appeals agreed, holding that the totality of circumstances analysis "requires the court to consider the way in which the disenfranchisement law interacts with racial bias in Washington's criminal justice system to deny minorities an equal opportunity to participate in the state's political process," *Farrakhan v. Washington*, 338 F.3d 1009, 1014 (9th Cir. 2003), App. 1a, 9a. The court of appeals further held that in determining whether Washington's felon disfranchisement provisions produce a discriminatory result, a court must consider factors external to the challenged voting mechanism as well as voting practices themselves. To do otherwise, the court stated, would "effectively read an intent

requirement back into the VRA, in direct contradiction of the clear command of the 1982 Amendments to Section 2 [of the VRA]." *Id.*, 338 F.3d at 1019, App. 19a. Because the district court found that the Respondents' evidence was "compelling," the court of appeals posited that, "had the district court properly interpreted the causation requirement under the totality of the circumstances test instead of applying its novel 'by itself' causation standard, the court might have reached a different conclusion." *Id.*, 338 F.3d at 1020, App. 22a (footnote omitted). Accordingly, the court of appeals reversed and remanded the case to the district court to evaluate the record evidence in light of the correct analysis. *Id.*, 338 F.3d at 1020, App. 23a.

The court of appeals panel explicitly agreed with the district court that the VRA covered felon disfranchisement laws:

> As a preliminary matter, we agree with the district court that Plaintiffs' claim of vote denial is cognizable under Section 2 of the VRA. Felon disenfranchisement is a voting qualification, and Section 2 is clear that any voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA. 42 U.S.C. § 1973. Indeed, the Supreme Court has made clear that states cannot use felon disenfranchisement as a tool to discriminate on the basis of race, *see Hunter v. Underwood*, 471 U.S. 222, 233, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (holding that where racial bias motivated its original enactment, a facially neutral felon disenfranchisement law violated the Equal Protection Clause), and Congress specifically amended the VRA to ensure that, "in the context of all the circumstances in the jurisdiction in question," any disparate racial impact of facially neutral voting requirements did not result from racial discrimination, Senate Report at 27; *see also Chisom v. Roemer*, 501 U.S. at 394 & n. 21, 111 S.Ct. 2354.

> Permitting a citizen, even a convicted felon, to challenge felon disenfranchisement laws that result in either the denial of the right to vote or vote dilution on account of race animates the right that every citizen has of protection against racially discriminatory voting practices. Although states may deprive felons of the right to vote without violating the Fourteenth Amendment, *Richardson v. Ramirez*, 418 U.S. 24, 54-55, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress.

338 F.3d at 1016, App. 13a-14a (footnote omitted).

The panel did not discuss the "plain statement" rule because Petitioners did not rely upon it in their brief to the court of appeals. The brief discussed the legislative history of the VRA, which Petitioners said "clearly demonstrates that [the statute] was never intended to extend the voting rights of convicted felons." Brief for Appellees, *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (No. 01-35032), at 13. Petitioners added in a footnote that "[t]he same conclusion would follow from the application of the 'plain statement rule.' Federal courts apply the 'plain statement rule' as a rule of statutory construction to limit the involvement of the federal courts in traditional state matters absent clear Congressional intent to the contrary . . . ." *Id.* at 13 n.3. Petitioners did not discuss, in the balance of that short footnote, the circumstances in which this Court has applied the "plain statement rule," *i.e.*, when a statute is ambiguous and unclear, see *infra* § IV.A., much less ask the court of appeals to affirm the district court's judgment in their favor on these alternate grounds.

The court of appeals rejected Petitioners' subsequent petition for rehearing and rehearing *en banc*. Dissenting from that action, Judge Kozinski wrote that "the district court's

decision granting summary judgment was correct, even if for the wrong reasons," *Farrakhan v. Washington*, 359 F.3d 1116, 1119 (9th Cir. 2004), App. 37a. He argued that the interpretation of the VRA supported by the majority conflicted with recent decisions of this Court and the United States Constitution. 359 F.3d at 1124, App. 46a-47a.

REASONS FOR DENYING THE WRIT

Introduction

The conflict between the decision below and a single contrary appellate ruling with precedential weight does not warrant this Court's exercise of its discretionary certiorari jurisdiction. Given the benefits of further litigation in the lower courts and the absence of need for immediate review (especially where the decision below correctly applies a provision of federal law), this Court should deny the petition and permit the case to be litigated to final judgment, at which time both the necessity, if any, of deciding the federal question and the full factual context for doing so will be clear. Because the "plain statement" issue on which Petitioners centrally rely before this Court, see Pet. at 17-20, was neither raised nor discussed below, Petitioners' claim of conflict among the circuits is overstated.

Moreover, whatever conflict may exist is, at best, one of theory because the decisions that have addressed the question of the VRA's application to felon disfranchisement laws have not yet had any practical effect upon state law since they have not yet resulted in final judgments. Thus, Petitioners now seek interlocutory review of a federal question that might be unnecessary if the case were permitted to proceed to final judgment. Finally, the Ninth Circuit correctly decided that the VRA applies to felon disenfranchisement laws — a decision

supported by the text, legislative history, and even the "plain statement" analysis of the Voting Rights Act.

I

Certiorari Should Be Denied Because Petitioners Failed To Raise Their Plain Statement Argument At The Appellate Level.

This Court has ruled that it "will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S 257, 259 (1987) (*citing California v. Taylor*, 353 U.S. 553, 556 n.2 (1957)); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Lawn v. United States*, 355 U.S. 339, 362-63 n.16 (1958) (noting that "[o]nly in exceptional cases will this Court review a question not raised in the court below").

Petitioners did not raise the "plain statement" argument before the Ninth Circuit,[2] either on direct appeal, see *supra* p. 5, or in their request for rehearing and rehearing *en banc*.[3]

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[2] Petitioners raised the "plain statement" argument before the district court, which held that the plain statement rule does not apply to the VRA. *Farrakhan v. Locke*, 987 F. Supp. at 1308-09, App. 73a-74a.

[3]The issues Petitioners raised for *en banc* review were stated as follows:

(1) "The panel decision conflicts with Salt River by allowing this Voting Rights Act challenge to proceed on a record demonstrating nothing more that statistical disparity[,]" and

Consequently, as stated in the Petition, "the Ninth Circuit did not discuss the application of the plain statement rule to the Voting Rights Act." Pet. at 9. Petitioners failed to inform this Court, however, that they had not urged the court below to uphold the grant of summary judgment in their favor on the basis of the plain statement rule.

Where, as here, an issue has not been decided by the court of appeals, certiorari review of that issue is routinely denied. *See, e.g., Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (declining to address whether application of the ADA to state prisons is a constitutional exercise of Congress' power under the Commerce Clause or § 5 of the Fourteenth Amendment because the issue was not addressed by the lower courts); *Adickes*, 398 U.S. at 147 n.2 (1970) (declining to hear petitioner's challenge to the Civil Rights Cases because an "examination of the record show[ed] that petitioner never raised any issue concerning the 1875 statute before the Court of Appeals"); *Husty v. United States*, 282 U.S. at 701-02 ("[W]e do not consider [the rulings on the evidence], since they were not assigned as error on the appeal to the Court of Appeals, and it does not appear that they were presented or passed upon there."). The absence of any mention of the plain statement rule in the issues on appeal and Petitioners' failure to avail themselves of every opportunity to raise this issue in the court of appeals as a basis for affirmance militate strongly in favor of denying certiorari.[4]

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(2) "The panel decision similarly conflicts with the decision of the Sixth Circuit in *Wesley v. Collins*, which concluded that statistical disparity in felon disfranchisement does not establish a violation of the Voting Rights Act."

Petition for Rehearing and Petition for Rehearing *En Banc*, *Farrakhan v. Washington*, 338 F.3d 1009 (No. 01-35032), at 3.

[4] This Court used similar reasoning in *Adams v. Robertson*, 520 U.S. 83 (1997) in dismissing the case, holding that certiorari was

II

Petitioners Overstate The Extent Of Any Circuit Conflict; This Court Has Denied Certiorari Where The Alleged Conflict Was More Developed Than That Presented Here.

Only three courts of appeals have issued opinions of precedential effect concerning the VRA's application to felon disfranchisement laws.[5] *See Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), App. 1a; *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986). Only two of those opinions squarely confront the question whether the Voting Rights Act applies to felon disfranchisement: *Muntaqim*, 366 F.3d at 115 (holding that the VRA does not apply to felon disfranchisement); *Farrakhan*, 338 F.3d at 1016, App. 13a-14a (holding the reverse). As the Second Circuit observed in *Muntaqim*, the Sixth and Eleventh Circuits have assumed without expressly deciding that the Voting Rights Act applies to felon disfranchisement. *Muntaqim*, 366 F.3d at 112 & n.12 (*citing Wesley*, 791 F.2d at

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improvidently granted since the federal constitutional argument was never presented to the state supreme court. *Id.* at 85. (The Court explicitly noted that it would reach this result whether it considered the requirement that the argument be fairly presented to the state court to be jurisdictional or to be prudential in nature. *Id.* at 90.) Although the petitioners in *Adams* devoted two pages of their brief in the state court to the discussion of a case relevant to the constitutional argument, this Court found the discussion "unrelated" and "insufficient" to meet the requirement. *Id.* at 88.

[5] "Because the ten members of the Court who decided *Baker* split evenly on its disposition, the opinions in that case have no precedential effect, and the decision of the District Court was left undisturbed." *Muntaqim v. Coombe*, 366 F.3d 102, 107-08 (2d Cir. 2004) (discussing *Baker v. Pataki*, 85 F.3d 919, 921 n.2 (2d Cir. 1996)).

1259-61; *Johnson v. Bush*, 353 F.3d 1287, 1303-04 (11th Cir. 2003)). The Eleventh Circuit panel opinion has since been vacated by the grant of rehearing *en banc*, *Johnson v. Bush*, 2004 WL 1609101 (11th Cir. July 20, 2004) (No. 02-14469).

Further, of the two courts of appeals that have squarely decided whether the VRA applies to felon disfranchisement laws, only the Second Circuit in *Muntaqim* has applied the "plain statement" rule, 366 F.3d at 104 (applying "plain statement" rule on the grounds that construing the Voting Rights Act to cover felon disfranchisement would alter the balance of power between the federal and state governments), making it the only court of appeals to adopt this approach. The Ninth Circuit below, in deciding this question, referred to the plain language of the VRA, holding that "[f]elon disfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA." *Farrakhan*, 338 F.3d at 1016, App. 13a (citation omitted) (emphasis in original). Thus, while the Second Circuit and the court below ultimately reached different results, their rationales are not directly in conflict to an extent that warrants this Court's intervention in this developing area of the law.

This Court has denied petitions for writs of certiorari in similar situations, even where the conflict among the courts was more fully developed. Recently, for example, in *McNeil v. Legislative Apportionment Comm'n of N.J.*, 124 S. Ct. 1068 (2004), this Court denied certiorari despite the existence of a split between the Sixth, Seventh, Ninth, and Eleventh Circuits, and a panel of the Fifth Circuit, all of which had held that influence-dilution claims were not cognizable under the Voting Rights Act, and the First Circuit and a different panel of the Fifth Circuit, which held that such claims were viable. *See* Petition for a Writ of Certiorari, *McNeil v. Legislative Apportionment Comm'n of N.J.* (No. 03-652), at 9-10.

Denying certiorari in this context allows this Court to delay until the issue matures through study and is further developed by lower courts. *E.g.*, *Durden v. California*, 531 U.S. 1184 (2001) (Souter, J., dissenting from denial of certiorari) ("[R]ulings by other courts . . . would be valuable to us in any examination of the issue we might ultimately give it."); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari) (observing that denial of certiorari gives state and federal courts the opportunity to study the issue further); *see also McCray v. New York*, 461 U.S. 961, 963 (1983) (Opinion of Stevens, J., joined by Blackmun & Powell, JJ., respecting the denial of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."); *cf. Bunting v. Mellen*, 124 S. Ct. 1750, 1752 (2004) (opinion of Stevens, Ginsburg & Breyer, JJ.) (suggesting that certiorari was properly denied where apparent conflict could be explained by factual differences between the case at bar and facts in "conflicting" cases).

For these reasons, the instant case is not "certworthy" and Petitioners' request for review should be denied.

III

The Judgment Below Is Interlocutory And Review At This Stage Would Be Premature.

The Ninth Circuit Court of Appeals "remand[ed] this claim . . . for further proceedings [and] any requisite factual findings following an appropriate evidentiary hearing." *Farrakhan v. Washington*, 338 F.3d at 1020, App. 23a. The interlocutory nature of the court of appeals' ruling weighs against present review by this court. *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328

(1967) (*per curiam*) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *see also VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

As stated above, the Ninth Circuit never addressed the merits of the § 2 claim in this case; it merely held that the district court erred in excluding evidence of discrimination in Washington's criminal process from consideration in the "totality of the circumstances" inquiry on summary judgment: "We recognize [that Plaintiffs' § 2 claim] is a difficult issue and that it requires a searching inquiry into all factors that bear on Plaintiffs' claim. We, however, express no opinion on the merits of Plaintiffs' claim and leave that determination to the district court in the first instance." *Farrakhan v. Washington*, 338 F.3d at 1020, App. 23a. Whether the VRA can apply at all to felon disfranchisement statutes should not be decided on a limited record that does not reflect the ultimate practical effect its application in Washington. Given the limited record before this Court, and the limited number of decisions on point, this Court should decline review of this issue in order to allow it to develop fully through further lower court consideration.

IV

The Court Below Decided Correctly That The VRA Applies To Felon Disfranchisement Laws And Further Review Is Unnecessary.

The Ninth Circuit's holding that a felon disfranchisement challenge is cognizable under § 2 of the VRA is legally sound and comports with the rules of statutory construction articulated by this Court.

A. The Plain Meaning Of § 2 Is Unambiguous On Its Face.

Section 2 of the Voting Rights Act expressly prohibits any "voting qualification or prerequisite to voting" that is applied "in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color . . . ." 42 U.S.C. § 1973(a). As a matter of strict textual interpretation, it is indisputable that felon disfranchisement laws fall within the purview of § 2 as a voting "qualification" or "prerequisite." *Id.* The ordinary meaning of the key terms in the provision — "voting qualification or prerequisite," "any citizen" and "on account of race or color" — supports this reading of the statute.[6] None of these terms or phrases is elusive or confusing

[6] For example, the dictionary definition of "qualification" is "a condition or standard that must be complied with (as for the attainment of a privilege)." *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 963 (1990). Felon disfranchisement laws, which condition voting on being free of a felony conviction, are a "qualification" to voting as that term is defined. Similarly, the dictionary definition of "prerequisite" is "something that is necessary to an end or to the carrying out of a function." *Id.* at 929. The requirement that a person not be convicted of or under state custody for a felony in order to vote is clearly a "prerequisite" to voting. Moreover, as citizens of the United States, Respondents clearly have standing under § 2, which prohibits the abridgement of "the right of any citizen . . . to vote on account of race or color," 42 U.S.C. § 1973(a) (emphasis added). Indeed, persons with felony convictions fall under the definition "any citizen" within the meaning of the statute as they never cease to be citizens during any stages of state custody, including incarceration. Finally, felon disfranchisement laws, like any other voting qualification or prerequisite, might result in the denial of the right to vote "on account," for the sake, by reason, or because of race or color. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 13 (2002) (defining the term "on account of").

in their meaning; nor are they subject to multiple reasonable interpretations.

As is well articulated by this Court, in interpreting the scope of a statute, courts must first discern the statute's plain meaning. *See, e.g., Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 187 (1991). If the statute's meaning is unambiguous, as is the language of § 2, the court should apply the law according to its terms. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (holding that where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Indeed, federal courts routinely interpret § 2 on the basis of its plain meaning. *See, e.g., Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) (relying on the "plain language of Section 2 of the Voting Rights Act" to demonstrate that the provision applies only to citizens); *Nixon v. Kent County*, 76 F.3d 1381, 1386-87 (6th Cir. 1996) (finding that "[n]othing in the clear, unambiguous language of § 2 allows or even recognizes the application of the Voting Rights Act to coalitions . . . ."); *Johnson v. DeSoto County Bd. of Comm'rs*, 72 F.3d 1556, 1563 (11th Cir. 1996) (holding that the "plain language of § 2 . . . requires a showing of discriminatory results" even where there is discriminatory intent); *New Rochelle Voter Def. Fund v. City of New Rochelle*, 308 F. Supp. 2d 152, 158 (S.D.N.Y. 2003) ("Our discussion begins, as it must, with the consideration of the plain meaning of [Section 2 of the VRA]."); *Holley v. City of Roanoke*, 162 F. Supp. 2d 1335, 1340 (M.D. Ala. 2001) ("A plain reading of [Section 2 of the VRA] clearly demonstrates its applicability only to those systems in which officials are chosen through an election."); *France v. Pataki*, 71 F. Supp. 2d 317, 326 (S.D.N.Y. 1999) ("The plain language of the Voting Rights Act makes it clear that it is only concerned with the voting practices

of citizens."); *Williams v. State Bd. of Elections*, 696 F. Supp. 1563, 1568-69 (N.D. Ill. 1988) (holding that "[b]y its very terms, the [Voting Rights] Act extends only to mechanisms involved in the election of representatives" and not the appointment of judges).

The legislative history of an unambiguous statute is not considered by the court for purposes of interpreting the meaning of the statute. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (courts will "not resort to legislative history to cloud a statutory text that is clear."); *Schick v. Schmutz (In re Venture Mortgage Fund, L.P.)*, 282 F.3d 185, 188 (2d Cir. 2002) ("'Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.'") (quoting *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999)).

Moreover, even if a statute is subject to a construction that alters the balance between federal and state powers, only where the statute is ambiguous must courts find a plain statement from Congress that this result was specifically intended before adopting that construction. *See, e.g., Salinas v. United States*, 522 U.S. 52, 60 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *see also Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991) (the plain statement rule applies only to ambiguous statutes).

Petitioners ignore entirely the plain meaning of § 2, which on its face clearly encompasses any voting disqualification, including one based on a felony conviction. Instead, the State asks this Court to disregard well-settled canons of statutory interpretation, which require an analysis of § 2's plain meaning, and to apply the plain statement rule, which the court below appropriately did not reach. The State relies on general principles of federalism and the legislative history of the VRA as a whole — avoiding the specific text and legislative history of §2 — to argue that the plain statement rule applies. *Id.*

This blatant misapplication of the clear tenets of statutory construction should not be countenanced by this Court. Indeed, not only has this Court never elected to apply the plain statement rule to the VRA, it affirmatively declined to apply it to Section 2, prior to the 1982 amendments to the statute. *See City of Rome v. United States*, 446 U.S. 156, 178-80 (1980); *see also Chisom v. Roemer*, 501 U.S. 380, 412 (1991) (Scalia, J., dissenting) ("[W]e tacitly rejected a 'plain statement' rule as applied to the unamended § 2 in *City of Rome v. United States* . . . ."). And, as Petitioners concede, "Congress did not change the scope of the coverage of the VRA in 1982. *Chisom v. Roemer*, 501 U.S. 380, 384 (1980 [*sic*: 1991])." Pet. at 20.

B. Even Assuming The Plain Statement Rule Applies, The Ninth Circuit Was Correct In Holding That § 2 Covers Washington's Felon Disfranchisement Laws.

Following its own well-settled precedent of applying the plain meaning of statutes where it is evident, this Court cannot reach the plain statement rule in this case. However, assuming that the plain statement rule applies,[7] the Ninth Circuit was correct in applying § 2 to Washington's felon disfranchisement statutes.

1. Covering Felon Disfranchisement Under § 2 Does Not Alter Impermissibly The Balance Between Federal And State Powers.

As noted above, if a statute is ambiguous and the proffered statutory interpretation alters the balance of federal and state powers, the Court must find a plain statement from Congress

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[7] Should this Court determine that the plain statement rule applies, it should permit the court below to conduct the analysis in the first instance.

that it intended this result. Assuming, *arguendo*, that § 2 is ambiguous, reading § 2 to cover felon disfranchisement statutes does not impermissibly alter the balance between state and federal powers and, indeed, requires no further shift in the balance of state and federal powers than that already sanctioned by Congress and this Court.

Congress and this Court have made clear that the VRA was enacted specifically for the purpose of enforcing and extending the protections of the Reconstruction Amendments. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 482 (1997). Furthermore, it is well settled that these Reconstruction Amendments permissibly shift the balance of federal and state powers to remedy racial discrimination. By extension, the Voting Rights Act enjoys the same latitude shared by these amendments.

In *Chisom v. Roemer*, which was handed down the same day that the Court applied the plain statement rule in determining the application of the Age Discrimination and Employment Act to mandatory retirement laws enacted under the Commerce Clause,[8] this Court did not apply the plain statement rule. The omission of the plain statement rule from the Court's analysis in *Chisom*, a § 2 case, implies that the plain statement rule does not apply to legislation enforcing the Civil War Amendments despite their interference with state powers. Indeed, in his dissent in *Chisom*, Justice Scalia acknowledged that the plain statement rule should not apply in Section 2 cases. *Chisom*, 501 U.S. at 412 ("I am content to dispense with the 'plain statement' rule in the present cases . . . .") (citation omitted).

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[8]*Gregory v. Ashcroft*, 501 U.S. at 470.

2. The Legislative History Of §§ 2 And 4 Demonstrates Congress' Clear Intent Not To Exclude Felon Disfranchisement From The Reach Of § 2.

There is simply no evidence to suggest that Congress intended to exclude felon disfranchisement from § 2's reach. Nothing in the text or legislative history of § 2 provides an exception for felon disfranchisement (or any other voting practices that may result in discrimination on account of race). *See Chisom*, 501 U.S. at 392 ("Section 2 protect[s] the right to vote, and it d[oes] so without making any distinctions . . . ."). For the same reason that § 2's plain meaning precludes application of the plain statement rule, *see supra* pp. 13-16, Respondents submit that the text of the statute itself is evidence of Congress' intent that § 2 extend to all voting practices, including voting qualifications based on a felony conviction. Indeed, Congress intended § 2 to have nationwide coverage and to be construed broadly to include all qualifications, prerequisites, standards, practices or procedures that had the purpose or the effect of discriminating on account of race. *See, e.g., Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) ("The [Voting Rights] Act gives a broad interpretation to the right to vote . . . .").

Moreover, rules of statutory construction do not require Congress to provide a "laundry list" of statutory application. *Moskal v. United States*, 498 U.S. 103, 111 (1990) (applying plain meaning of statute, rejecting the contention that "every permissible application of a statute [must] be expressly referred to in its legislative history"); *see also Pa. Dept. of Corrs. v. Yeskey*, 524 U.S. at 212 (1998) ("[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'") (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119

(2001); *see also Chisom*, 501 U.S. at 396 (breadth of statutory language ["elect *representatives* of their choice"], absence of statutory language expressly excluding judges from coverage of section, and lack of any statements in legislative history regarding exclusion of judicial elections, together foreclose any interpretation of statute as not applying to judicial elections) (emphasis added).

To the extent that Congress expressly refers to felon disfranchisement in the text and legislative history of the VRA at all, the statutory language and legislative history demonstrate that when Congress intends to exclude felon disfranchisement from the coverage of the Act, it does so plainly. Specifically, § 4 of the Voting Rights Act,[9] in which Congress explicitly excluded felon disenfranchisement laws from the definition of "tests or devices," cannot be read also to exclude felon disfranchisement from the reach of § 2. The exclusion of felon disenfranchisement under § 4 does not authorize states to use felon disfranchisement as a mechanism to discriminate in voting. Such a result would be antithetical to the purposes of the Voting Rights Act that have been identified both in its legislative history and by this Court. Rather, the exception under § 4 allows states to adopt and implement felon disfranchisement laws only so long as these laws are not applied in a manner that is intentionally discriminatory or that results in discrimination, in which case the laws would fall within the purview of §2.

There is no canon of statutory construction that would support exporting the legislative intent behind one statutory provision to another. *See, e.g., Int'l Bhd. of Teamsters v.*

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[9] Section 4(a) and 4(b) of the VRA, 42 U.S.C. §§ 1973b(a), (b), establish criteria to identify jurisdictions within which literacy tests and other devices that had been used as prerequisites to voting may be suspended, and that also are subject to the preclearance requirements of § 5 of the Act, 42 U.S.C. § 1973c.

United States, 431 U.S. 324, 354 n.39 (1977) (holding that the legislative history of a statutory provision not at bar is "entitled to little if any weight"); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."). Sections 2 and 4 are each substantively unique and neither their texts nor their legislative histories are interchangeable.[10]

C. Application Of § 2 Of The Voting Rights Act To Washington State's Felon Disfranchisement Scheme Is Entirely Consistent With This Court's Ruling In *Richardson v. Ramirez*.

Respondents' VRA challenge to Washington's felon disfranchisement scheme is neither precluded by, nor inconsistent with, this Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974). *Richardson* did not hold that felon disfranchisement laws could not be challenged under other provisions of federal and state law that do not directly conflict with § 2 of the Fourteenth Amendment of the United States Constitution. Instead, this Court left open the possibility for alternative challenges to felon disfranchisement, especially where there is evidence of discrimination. *See generally Hunter v. Underwood*, 471 U.S. 222 (1985).

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[10]As noted *supra* note 9, § 4 establishes criteria for identifying jurisdictions subject to the preclearance requirement of § 5. Those criteria have nothing to do with § 2. This Court has "consistently understood these sections [§§ 2 and 5] to combat different evils and, accordingly, to impose very different duties upon the States, see *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion) (noting how the two sections 'differ in structure, purpose, and application') . . . . " *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. at 477.

In *Richardson*, this Court examined the particular question of whether the Equal Protection Clause of § 1 of the Fourteenth Amendment prohibited California's felon disfranchisement scheme in light of § 2 of the same Amendment, which appeared to sanction such laws. *Richardson*, 418 U.S. at 27. This Court held that § 2 of the Fourteenth Amendment permits states to exclude convicted felons from the franchise, notwithstanding § 1's requirement that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. *See Richardson*, 418 U.S. at 54. However, in *Hunter*, nearly a decade after deciding *Richardson*, this Court found that Alabama enacted its felon disfranchisement provision with discriminatory intent and, therefore, in violation of the Equal Protection Clause. The Court held that § 2's authorization of state disfranchisement laws did not permit purposeful discrimination. *Hunter*, 471 U.S. at 233. Thus, *Richardson* is not the last word on constitutional challenges to felon disfranchisement provisions.

Moreover, *Richardson* did not address the issue raised in this case: whether the Voting Rights Act can be used to challenge a state's felon disfranchisement laws that result in the denial of the right to vote on account of race or color. Accordingly, *Richardson* does not and, as a matter of *stare decisis*, cannot close the door on Respondents' challenge to Washington's felon disfranchisement laws.

Indeed, the VRA challenge to felon disfranchisement laws is substantively different than the challenge brought in *Richardson* because it seeks to address racially discriminatory criminal disfranchisement. Although in *Richardson* this Court held that states may deprive felons of the right to vote without necessarily violating the Fourteenth Amendment, *Richardson*, 418 U.S. at 54-55, "when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to

seek redress." *Farrakhan v. Washington*, 338 F.3d at 1016, App. 14a; *see also Wesley v. Collins*, 791 F.2d at 1259-61 (assuming without deciding that § 2 applied to Tennessee's felon disfranchisement statute before holding that the statute did not violate the VRA).

This is precisely what Respondents here seek to demonstrate — that Washington State's felon disfranchisement scheme constitutes an improper race-based vote denial in violation of § 2. This claim is simply not inconsistent with nor foreclosed by *Richardson*.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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NO. 03-1597

IN THE SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON,

Petitioners,

v.

MUHAMMAD SHABAZZ FARRAKHAN, AL KAREEM SHADEED, RAMON BARRIENTES, CLIFTON BRICENO, MARCUS PRICE, AND TIMOTHY SCHAAF.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The majority of Respondents' Brief In Opposition is devoted to explaining why the decision below is correct. While we disagree with respondents' analysis, this reply will focus on the reasons the Court should grant the petition and resolve the parties' dispute about the merits of case.

1. There Is A Conflict Among The Circuits On An Important National Issue

In the petition, we explained that this case involves a conflict among the circuits on an important national question—whether the Voting Rights Act, 42 U.S.C. § 1973, allows individuals to challenge state laws that disenfranchise them based upon a felony conviction. Pet. 12-16, 20-23. Respondents do not dispute that this is an important national question. Instead, they suggest that the conflict is overstated and that the question should be allowed to percolate in the lower courts before this Court takes up the issue. Br. Opp. 9-11.

Respondents try to downplay the conflict between the decision below and *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004). According to respondents, "while the Second Circuit and the court below ultimately reached different results, their rationales are not directly in conflict to an extent that warrants this Court's intervention". Br. Opp. 10. Respondents are in error. The conflict is stark. In *Muntaqim*, the Second Circuit dismissed respondents' Voting Rights Act claim. The decision below did not. These two decisions cannot be reconciled.

With regard to their claim that review is premature, respondents point out that the Court has denied petitions when more circuits were involved in the conflict. Br. Opp. 10. However, the Court has no hard and fast rule about when a conflict needs to be resolved. For example, in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231 (2003), the Court granted review to resolve a disagreement between the majority and dissenters in an en banc decision of the Ninth Circuit. Here, the importance of the question counsels against delay. As we explained in the petition, forty-eight states have some form of felon disenfranchisement law, and a number of cases have been filed challenging those laws. Pet. 22. Whether the Voting Rights Act applies to such claims is a key threshold question that needs to be definitively answered by this Court. In this respect, we note that the Second Circuit's decision in *Muntaqim*—holding that the Voting Rights Act does not apply to felon disenfranchisement claims—is currently pending before the Court on a petition for a writ of certiorari. *Jalil Abdul Muntaqim a/k/a Anthony Bottom v. Philip Coombe, Antony Annucci, Louis F. Mann* U.S.S.C Docket No. 04-175.

Not only is there conflict between circuits, but there is disagreement within circuits about this question. The decision below came after a strong dissent from the denial of rehearing en banc. The Eleventh Circuit decision in *Johnson v. Governor of the State of Florida*, 353 F.3d 1287 (11th Cir. 2003)—holding that the Voting Rights Act applies to felon disenfranchisement claims—came after a strong dissent. And now that rehearing en banc has been

granted in *Johnson*, the decision has been withdrawn. *Johnson v. Governor of the State of Florida*, 2004 WL 1609101 (11th Cir. July 20, 2004). The granting of the petition for rehearing en banc demonstrates the continuing confusion in the lower courts about this important question.

The Second Circuit correctly concluded in *Muntaqim*, "this panel believe[s] that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court". *Muntaqim*, 366 F.3d at 130.

2. The Question Presented In The Petition Was Presented Below

Respondents also suggest that the Court should deny the petition because petitioners failed to raise their plain statement argument at the appellate level. Br. Opp. 7-8. Respondents argue that when an issue has not been decided by the court of appeals, review is routinely denied. Respondents' argument confuses issues raised in the court of appeals and arguments used to support the resolution of those issues. In this case, the question presented does not involve the plain statement rule. The question presented asks:

> "Whether the Voting Rights Act, 42 U.S.C. § 1973, which prohibits voter disqualification based on race or color, allows an individual to challenge a state law that disenfranchises individuals based upon a felony conviction." Pet. i.

Petitioners argued to the Ninth Circuit that the Voting Rights Act was not intended to prohibit felon disenfranchisement. Brief Of Appellees at 9-13, *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), App. Pet. 1a. And petitioners expressly raised the plain statement rule. *Id.* 13 n.3. The Ninth Circuit's decision below expressly resolved this issue against petitioners. *Farrakhan*, App. Pet. 13a ("we agree with the district court that [respondents'] claim of vote denial is cognizable under Section 2 of the VRA").

The plain statement rule is not the question presented in this case. Rather, it is an argument supporting petitioners' claim that the question presented should be resolved in petitioners' favor—that the Voting Rights Act does not allow individuals to challenge their disenfranchisement based on a felony conviction. The Court does not require a petitioner to make exactly the same arguments in the lower courts that are made before this Court. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment.") (citations omitted) (internal punctuation omitted). *PGA Tour, Inc., v. Martin*, 532 U.S. 661, 678 n.27 (2001) ("Martin complains that petitioner's failure to make

this exact argument below precludes its assertion here. However, the Title III coverage issue was raised in the lower courts, petitioner advanced this particular argument in support of its position on the issue in its petition for certiorari, and the argument was fully briefed on the merits by both parties. Given the importance of the issue, we exercise our discretion to consider it.").

The question presented is properly before the Court.

3. Review Of This Case Is Not Premature

Respondents also suggest that review is premature because the decision below is interlocutory. Br. Opp. 11-13. Review is not premature for two reasons. First, this case falls within the exception to the Court's general policy of reviewing final decisions. The Court will review judgments that are not final if the issue is "fundamental to the further conduct of the case". *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (citation omitted) (internal punctuation omitted). One of the issues the Court has determined to be fundamental is the jurisdiction of the federal court. Thus, in *Land*, the fundamental issue was whether the plaintiff's case should be dismissed because the action was against the United States. *Id.* at 734. *Accord Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) ("The judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'"). This case presents the same kind of fundamental jurisdictional

issue—whether a claim of felon disenfranchisement can go forward under the Voting Rights Act.

Second, there is no benefit to the Court in delaying consideration of the case. The question of the scope of the Voting Rights Act is an issue of law, so further development of the record below will not assist the Court in resolving the case.

4. Conclusion

For all of the foregoing reasons, petitioners respectfully request their petition for certiorari be granted.

Respectfully submitted.

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No. 03-1597

IN THE

Supreme Court of the United States

GARY D. LOCKE, Governor of the State of Washington, SAM REED, Secretary of State of the State of Washington, and THE STATE OF WASHINGTON,

Petitioners,

v.

MUHAMMAD SHABAZZ FARRAKHAN, AL KAREEM SHADEED, RAMON BARRIENTES, CLIFTON BRICENO, MARCUS PRICE, and TIMOTHY SCHAAF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THOMAS JOHNSON, *et al.* FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OUT OF TIME AND *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS OUT OF TIME

Relief Sought

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae,* Thomas Johnson, Jau'Dohn Hicks and John Hanes (hereinafter "*amici*"), move for leave to file out of time the attached Brief of *Amici Curiae* in Support of the Respondents. All the Petitioners - Gary Locke, Governor of the State of Washington, Sam Reed, Secretary of the State of Washington, and the State of Washington have given their written consent to the filing of an *amicus* brief but express no opinion about whether the Court should permit the brief to be filed out of time. All the Respondents - Muhammad Shabazz Farrakhan, Al Kareem Shadeed, Ramon Barrientes, Clifton Briceno, Marcus Price and Timothy Schaaf have consented in writing to the filing of the brief. This motion is required because the deadline has passed for the filing of the Respondents' brief.

Interest of *Amici* in Case

Amici are plaintiffs and class representatives in *Johnson v. Bush*, No. 02-14469, pending in the United States Court of Appeals for the Eleventh Circuit. *Johnson v. Bush* is a class action challenging Florida's felony disenfranchisement law on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and that it violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. The Voting Rights Act claim raises precisely the same issue as

that presented by the petition for certiorari in this case. The Eleventh Circuit has granted *en banc* review of this issue, among others, and scheduled oral argument for the week of October 25, 2004. See App., *infra,* 1a-3a. *Amici's* direct interest in the question presented here is more fully described in their brief, *infra,* at 1-2.

Grounds for Granting Leave to File Out of Time

The deadline for the Respondents' brief on this petition was July 28, 2004. *Amici* learned by letter dated July 30, 2004 that the United States Court of Appeals for the Eleventh Circuit has requested the parties in *Johnson v. Bush* to focus their *en banc* briefs in part on the precise issue raised in this petition, namely whether Section 2 of the Voting Rights Act applies to felony disenfranchisement provisions.* The original Eleventh Circuit panel opinion in *Johnson v. Bush*, now vacated, held that the lower court erred in granting summary judgment to the defendants on the Voting Rights Act claim and remanded the case for trial.

Until just days before the deadline for the Respondents' brief, *amici* were preparing for trial. While a petition for rehearing *en banc* had been filed in the Eleventh Circuit by defendants on January 9, 2004, the court of appeals had not requested *amici* to respond. *See* Fed. R. App. P. 40(a)(3), 35(e). In this uncertain procedural posture, *amici*'s interest in the Petitioners'

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* The appeal in this case also involved numerous constitutional issues. Although the order granting rehearing *en banc* was issued on July 20, 2004, the Court on that date explained that counsel would be notified of further details by subsequent correspondence. The subsequent notification was provided by letter to all counsel of record dated July 30, 2004 and identified the issue raised in this Petition as one of interest to the Court. See App., *infra,* 1a.

petition for certiorari was more tenuous. Now that the Eleventh Circuit has made clear its intention to hear further argument on the precise issue raised here, however, *amici* have a more direct interest in advising the Court of their view that it is unwise to grant this petition.

The issues presented by this case are of exceptional importance to *amici* and to the class they represent. *Amici* developed an extensive factual record of the discriminatory purpose and effect of Florida's felony disenfranchisement laws in their opposition to the summary judgment motions in the district court. This Court's examination of whether Section 2 of the Voting Rights Act reaches felony disenfranchisement provisions would benefit from further development of the issues in lower courts including in cases arising from jurisdictions where such provisions originally were enacted in order to prevent black citizens from voting, and where there is significant continuing evidence of the discriminatory impact of the practice. Therefore, *amici*, respectfully seek leave of this Court to file the attached brief supporting the Respondents and urging denial of the petition for writ of certiorari.

Dated: August 19, 2004

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

Interest of *Amici Curiae*

Amici are plaintiffs and class representatives in *Johnson v. Bush*, No. 02-14469C, pending in the United States Court of Appeals for the Eleventh Circuit, who claim, in part, that Florida's felony disenfranchisement laws violate Section 2 of the Voting Rights Act of 1965.[1] *Amici* represent the class of all Florida citizens convicted of felonies who have completed all terms of incarceration, probation, or parole and are otherwise eligible to vote but remain barred from voting. They have a direct and substantial interest in the resolution of the issue presented for review in this petition.

Amici are uniquely situated because their claim that Florida's felony disenfranchisement provisions violate Section 2 of the Voting Rights Act is supported by significant evidence of a racially discriminatory intent motivating the original enactment. *See Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338-39 (S.D. Fla. 2002) ("Plaintiffs have present[ed] to this Court an abundance of expert testimony about the historical background of Florida's felon disenfranchisement scheme as historical evidence that the policy was enacted originally in 1868 with the particular discriminatory purpose of keeping blacks from voting."). In addition, the record in *Johnson v. Bush* includes substantial evidence of racially polarized voting, the use of voting practices and procedures that discriminate

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[1] No party's counsel authored any part of this brief. No person or entity other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

against minority voters, and other evidence of relevant factors tending to show that in the totality of the circumstances felony disenfranchisement causes an inequality in the electoral opportunities of black and white voters. *See Johnson v. Governor of the State of Florida,* 353 F.3d 1287, 1306 (11th Cir. 2003), *reh'g en banc granted,* 2004 WL 1609101 (11th Cir. July 20, 2004).

Therefore, *amici* have a direct interest in ensuring that any final determination of how Section 2 of the Voting Rights Act applies to felony disenfranchisement provisions considers those states where these provisions were originally enacted with a discriminatory intent and where there is evidence of other modern barriers to equal political participation by black voters. Their claims could be affected by the Court's decision to grant certiorari in this case.

Summary of Argument

This petition for writ of certiorari should not be granted because the courts of appeals have not had the chance to complete their examination of the question presented and their further analysis could be of assistance to this Court. Currently the Court of Appeals for the Eleventh Circuit is reviewing whether Section 2 of the Voting Rights Act applies to Florida's felony disenfranchisement laws.[2] It is preferable to allow the lower courts to review the issue first rather than attempt a premature adjudication by this Court. The application of

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[2] *Johnson v. Governor of the State of Florida,* No. 02-11469, is currently scheduled for oral argument before the Eleventh Circuit sitting *en banc* during the week of October 25, 2004. *See* App., *infra,* 3a.

the Voting Rights Act to Florida's felony disenfranchisement laws is particularly significant because there is substantial evidence that these provisions were originally intended to disenfranchise black voters in Florida. The record in the Florida case also includes evidence of discriminatory practices in the criminal justice system that interact with the state's felony disenfranchisement practices to deny black voters an equal opportunity to participate in the political process. This factual context is relevant to whether Section 2 of the Voting Rights Act applies to these laws.

In addition, the petition in this case should be denied because the order of the court below was interlocutory and no particular circumstances exist that would justify exercise of this Court's jurisdiction to review the question presented at this preliminary stage.

Argument

I. The Question Presented in the Petition Should Not Be Considered Prematurely

The lower courts have not had adequate opportunity to consider the question presented by this petition, whether Section 2 of the Voting Rights Act can be applied to felony disenfranchisement provisions. That very issue is currently pending *en banc* review before the Court of Appeals for the Eleventh Circuit in *Johnson v. Governor of the State of Florida, et al,* No. 02-14469. The Eleventh Circuit has requested the parties in *Johnson* to address several issues, the first of which is exactly the same as the question raised in the petition in this case. In *Johnson,* the Eleventh Circuit

notified the parties that it desires counsel to focus their briefs on six specific questions, including the following:

> Considering the statutory text, congressional intent, Section 2 of the Fourteenth Amendment, and the relevant principles of statutory construction ... does § 2 of the Voting Rights Act (VRA) reach disenfranchisement provisions?

App., *infra,* 1a.

Although the issue is the same, the factual context in which *Johnson* arises is materially different. In *Johnson, amici* have come forward at the summary judgment stage with significant evidence of the original discriminatory intent of Florida's felony disenfranchisement provision. As the Florida district court acknowledged, there is in the record "an abundance" of expert testimony about the original enactment of Florida's felony disenfranchisement scheme including evidence that it was originally adopted for the purpose of keeping blacks from voting. *Johnson v. Bush,* 214 F. Supp. 2d at 1338-39. In addition, in *Johnson, amici* presented substantial evidence of racial discrimination in matters affecting voting in Florida as well as proof that blacks are disproportionately disenfranchised as ex-felons in part because of the way Florida's discretionary law enforcement and criminal justice policies interact with the continuing effects of past official intentional race discrimination. *See Johnson v. Governor of the State of Florida,* 353 F.3d 1287, 1306 (11th Cir. 2003). The proof *amici* presented in *Johnson* goes far beyond unvarnished disparate impact. It combines evidence of the intentionally discriminatory origins of Florida's felony disenfranchisement policy with proof of the policy's ongoing racial effect that cannot be attributed to racial differences in criminal involvement.

Although evidence of intentional discrimination is relevant, albeit not necessary, in assessing the "totality of circumstances" standard under Section 2 of the Voting Rights Act, *see Thornburg v. Gingles,* 478 U.S. 30, 35 (1986), this historical and factual evidence is also important to the determination whether Congress intended Section 2 of the Voting Rights Act to cover felony disenfranchisement and whether it had the constitutional power to do so. This evidence is relevant to Congress' intent because Congress could not have intended a notorious method of disenfranchising minorities to escape the coverage of its most expansive and comprehensive Voting Rights Act. *See Morse v. Republican Party of Virginia,* 517 U.S. 186, 235-236 (1996) (opinion of Breyer, J., joined by O'Connor and Souter, JJ., concurring in judgment).

This evidence is also relevant in assessing Congress' constitutional power because Congress' remedial power to meaningfully enforce the Fifteenth Amendment depends in part on the history of violations of the rights at stake. *See Tennessee v. Lane,* 124 S. Ct. 1978, 1988, 1992-93 (2004) (holding, under the Fourteenth Amendment, that "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent" and can be assessed "as it applies to [a] class of cases" and not "as an undifferentiated whole"). Any determination limiting the applicability of the Voting Rights Act that does not take into account this evidence of discriminatory purpose and effect will provide scant guidance to states such as Florida that permanently disenfranchise high proportions of their African-American

populations in the context of documented intentional race discrimination in voting.[3]

If this Court is disposed to consider the applicability of Section 2 of the Voting Rights Act to felony disenfranchisement laws, it should await the full factual development in jurisdictions with a historical record "supporting the basic congressional findings that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges." *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 758 (2003) (Kennedy, J., dissenting) (quoting *Katzenbach v. Morgan,* 384 U.S. 641, 667 (1966)). For it is only in light of such a record that an informed determination can be made concerning the appropriate role of Section 2 in remedying the racial effects of discriminatory felony disenfranchisement laws.

It would be premature to grant certiorari in this case before the Eleventh Circuit has had an opportunity to fully explore the same question in the context of a state that has a demonstrable history of permanently disenfranchising people convicted of felonies in order to keep blacks from voting, a state that is also covered by Section 5 of the Voting Rights Act, and a state that has recently used measures that deny black voters an equal opportunity to

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[3] Because four of the eight states that permanently disenfranchise people with felony convictions are also states that are covered by Section 5 of the Voting Rights Act and therefore are states that previously used literacy tests and other devices to disenfranchise black voters, this factual context is particularly important. The four states are: Alabama, Florida, Mississippi and Virginia. *See* Developments in the Law, *One Person, No Vote: The Laws of Felon Disenfranchisement,* 115 Harv. L. Rev. 1939, 1943 & n. 29 (2002); and 42 U.S.C. § 1973b (b) (required factual determinations to establish coverage under Section 5).

participate in elections.[4] Even in opposing the denial of rehearing en banc in this case, the dissenting Ninth Circuit judges acknowledged that "[i]ntentional discrimination in the criminal justice system, if it interacts with a standard, practice or procedure with respect to voting, could amount to illegal vote denial on account of race." *Farrakhan v. Washington,* 359 F.3d 1116, 1119 (9th Cir. 2004) (Kozinski, J, dissenting from denial of reh'g en banc) (citing *Johnson v. Governor of the State of Florida,* 353 F.3d 1287 (11th Cir. 2003)).

This petition should be denied while this issue continues to be given full and careful examination by the lower courts. As Justice Stevens has explained "[a] series of decisions by the courts of appeals may well provide more meaningful guidance to the bar than an isolated or premature opinion of this Court." *Singleton v. Commissioner of Internal Revenue*, 439 U.S. 940, 945 (1978) (Stevens, J., respecting denial of certiorari); *see also, McCray v. New York,* 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue merits further consideration in lower courts).

It is entirely possible that further litigation may produce a clearer delineation of how Section 2 of the Voting Rights Act applies to felony disenfranchisement provisions. The time is not ripe for this Court to resolve

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[4] In addition to the evidence *amici* presented at the summary judgment stage in *Johnson v. Governor of the State of Florida,* there is recent evidence of Florida's continuing use of its felony disenfranchisement laws to conduct purges of legitimate voters that increase the laws' disproportionate impact on black voters, *see, e.g.,* Ford Fessenden, *Florida List for Purge of Voters Proves Flawed,* New York Times, July 10, 2004, and evidence of intimidation of black voters, *see, e.g.,* Bob Herbert, *Suppress the Vote?,* New York Times, August 16, 2004.

this question while the Eleventh Circuit is reviewing the same issue in an importantly different factual situation.

II. The Petition Should be Denied Because the Court of Appeals' Interlocutory Order Merely Remanded the Case for Further Proceedings

The Petitioners are asking this Court to review an interlocutory order that is not a final judgment in the case. There are good reasons here to follow "the Court's normal practice of denying interlocutory review." *Estelle v. Gamble,* 429 U.S. 97, 115 (1976) (Stevens, J. dissenting). *See also Virginia Military Institute v. United States,* 508 U.S. 946 (1993) (Scalia, J., concurring) (denying certiorari before final judgment on fundamental constitutional issue to allow lower court to fully adjudicate claim, including appropriate remedy). First, the trial court has not made factual findings about the impact of Washington State's felony disenfranchisement laws on the ability of black voters to participate in the political process and to elect representatives of their choice which are central to the Section 2 claim. Such findings will assist this Court in determining whether this application of the Voting Rights Act is consistent with Congressional authority. *See South Carolina v. Katzenbach,* 383 U.S. 301, 329-30 (1966). The issue raised in this Petition is not a purely legal issue and therefore a more complete factual record from the lower courts would be useful.

Second, none of the factors that might otherwise suggest exercise of the Court's review at this stage are present here. There is no preliminary injunction that will have immediate consequences for the Petitioners. *See, e.g.,*

Mazurek v. Armstrong, 520 U.S. 968, 975-76 (1997) (grant of certiorari on interlocutory appeal is appropriate where state faces preliminary injunction). The lower court's decision is not patently incorrect. *See Myers v. Bethlehem Corp.,* 303 U.S. 41, 52 (1938) (granting certiorari where decree was clearly improvident). Finally, the Petitioners cannot point to any particular immediate impediment to the administration of justice that requires review at this interlocutory stage. The case raises significant issues that are all the better reviewed after final judgment.

Conclusion

Amici respectfully submit that in light of the Eleventh Circuit's recent grant of rehearing en banc in *Johnson v. Governor of the State of Florida,* and the potential for further helpful factual development by the lower courts in this case, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX

APPENDIX

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

July 30, 2004

TO ALL COUNSEL OF RECORD

Re: No. 02-14469 - Thomas Johnson, et al. v. Governor of the State of Florida, et al.

Dear Counsel:

For the purposes of the upcoming en banc rehearing in the above-referenced case, the court desires for counsel to focus their briefs on the following issues:

1. **Considering the statutory text, congressional intent, Section 2 of the Fourteenth Amendment, and the relevant principles of statutory construction -- with particular attention to those set out in *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S. Ct. 619, 70 L. Ed. 1059 (1926), *City of Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980), *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41,107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987), *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568,108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988), and *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) -- does § 2 of the Voting Rights Act (VRA) reach disenfranchisement provisions?**

2. Assuming § 2 of the VRA reaches disenfranchisement provisions, would Congress have exceeded its enforcement authority under § 2 of the Fifteenth Amendment?

3. What are the differences between the texts of the 1868 disenfranchisement provisions and the 1968 disenfranchisement provision? What is the significance of these differences between the constitutional provisions?

a. Pay particular attention to the fact that the 1868 constitution not only contained a self-executing provision that automatically disenfranchised "any person convicted of felony . . . unless restored to civil rights," Fla. Const. of 1868, art. XIV, § 2, but also included additional language that "[t]he Legislature shall have power and shall enact the necessary laws to [disenfranchise] all persons convicted of bribery, perjury, *larceny*, or of infamous crime," *id.*, art. XIV, § 4 (emphasis added). The 1968 disenfranchisement provision does not contain this additional language. Fla. Const of 1968, art VI, § 4 ("No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights. . . .").

b. Pay particular attention to the fact that the Fourteenth Amendment contains a blanket prohibition against all state laws that discriminate on the basis of race. Would this

blanket prohibition not trump any state law that so discriminates, and therefore would it not be correct to conclude that even though a state legislature can disenfranchise persons convicted of various crimes, it cannot do so on the basis of race?

4. **As plaintiffs are challenging the current (1968) disenfranchisement provision, if plaintiffs are able to show that the 1868 provision was enacted with racial animus, what effect -- if any at all -- would that showing have in analyzing the validity of the 1968 provision under the first prong of *Hunter v. Underwood*, 471 U.S. 222,105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985), which requires plaintiffs to show race was a substantial or motivating factor behind the challenged provision?**

5. **Assuming the 1868 provision was enacted with racial animus, what must the state of Florida, under *Hunter*, have done in 1968 to be deemed to have enacted a valid disenfranchisement provision?**

6. **In ruling on Florida's motion for summary judgment, did the district court view the evidence and all factual inferences therefrom in the light most favorable to the opposing party, and did the district court resolve all reasonable doubts about the facts in the non-movant's favor?**

Appellant's opening brief shall be filed in the Clerk's Office in Atlanta by 5:00 p.m., Friday, August 27, 2004. Appellee's

opening brief shall be filed in the Clerk's Office in Atlanta by 5:00 p.m., Friday, September 24, 2004. Any reply brief by the Appellants must be filed in the Clerk's Office in Atlanta by 3:00 p.m., Thursday, October 7, 2004. NO EXTENSIONS WILL BE GRANTED. An original and 18 copies of the en banc briefs should be filed (appellant's in blue covers, appellees' in red covers and any reply in gray covers). The parties are expected to insure that all other parties receive a copy of their briefs before the close of business on the day of filing (facsimile, e-mail, etc.). NO TIME FOR MAILING SHALL BE ALLOWED. All parties are also required to upload the brief in electronic format to the court's Web site as described in 11th Cir. R. 31-5.

All counsel are requested to file 16 copies of their opening panel briefs (bound in colored covers), record excerpts and supplemental authorities prior to 5:00, **Friday, August 27, 2004**.

The case will be argued before the Court sitting en banc during the week of October 25, 2004, in Atlanta, Georgia. Counsel will be allotted twenty minutes per side for oral argument. Counsel will receive a calendar notifying of the specific date and time of oral arguments at a later date.

Thank you for your attention to this matter.

Sincerely,

THOMAS K. KAHN, Clerk

By: s/ Matt Davidson
Matt Davidson
Calendar Clerk/Court Sessions Supervisor
404.335.6131